



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

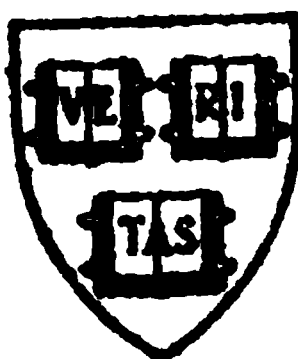
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL
LIBRARY**

Adk

REPORTS *c f*

PRODUCED.

territory of Hawaii
15, 1909

Authority
(IN THE COURT)

CO., LTD.

US/H
505
11/27

JUN 22 1910

JUSTICES OF THE SUPREME COURT

OF THE

TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE:

ALFRED STEDMAN HARTWELL,

ASSOCIATE JUSTICES:

ARTHUR ASHFORD WILDER,
Resigned Dec. 17, 1909.

SIDNEY MILLER BALLOU,
Resigned May 11, 1909.

ANTONIO PERRY,
Qualified May 11, 1909.

ATTORNEY-GENERAL

CHARLES REED HEMENWAY.

CIRCUIT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST CIRCUIT

FIRST JUDGE,

JOHN T. DE BOLT.

SECOND JUDGE,

ALEXANDER LINDSAY, JR.

Resigned April 30, 1909.

WILLIAM L. WHITNEY,

Qualified May 13, 1909.

THIRD JUDGE,

WILLIAM J. ROBINSON.

SECOND CIRCUIT.

AUWAE NOA KEPOIKAI,

Resigned.

SELDEN B. KINGSBURY,

Qualified Feb. 15, 1909.

THIRD CIRCUIT.

JOHN ALBERT MATTHEWMAN.

FOURTH CIRCUIT.

CHARLES F. PARSONS.

FIFTH CIRCUIT.

JACOB HARDY.

CASES REPORTED

Afong	Burns v.....	486
Ahi, Estate of		232
Ah Leong	Lau Dan v.....	417
Ahoy v.....	Raymond	568
Ahoy v.....	Raymond	627
Alexandre, Estate of.....		551
Antone	Savidge v.....	329
Archer v.....	Naka	547
Assessor	Ewa Plant. Co. v.....	72
Assessor v.....	Lucas	350
Assessor	Makee Sugar Co. v.....	331
Assessor	Pineapple Companies v.....	193
Assessor	Pineapple Companies v.....	230
Atcherley, In re.....		346
Atcherley, In re.....		535
Atcherley, In re.....		576
Atcherley, In re.....		647
Atcherley v.....	Jarrett	511
Atcherley v.....	Sheriff	511
Atherton v.....	Campbell	340
Atherton v.....	Treasurer	340
Auditor	Tax. Com. v.....	181
Auditor	Thompson v.....	181
Baker	Blake v.....	264
Baldwin	Lowrie v.....	258
Baldwin	Robinson v.....	9
Barete, Estate of.....		329
Bierce v.....	Waterhouse	398
Bierce v.....	Waterhouse	594
Bishop Trust Co. v.....	Oahu Sugar Co.	183
Blake v.....	Baker	264
Board of Supervisors.....	Emmeluth v.....	171
Booth v.....	Schnack	659
Boyd	Shaw v.....	83
Brash, Estate of.....		522
Brown	Fitchie v.....	415

Brown v.	Holmes	268
Brown v.	Lee Chuck	4
Brown	Supt. Pub. Works v.	41
Brown	Territory v.	41
Burns v.	Afong	486
Campbell	Atherton v.	340
Campbell-Parker, Estate of.		393
Campbell-Parker	Supt. Pub. Works v.	41
Campbell-Parker	Territory v.	41
Cardozo v.	Sociedade de San Antonio..	319
Carpenter v.	Lawson	433
Carter	Territory v.	198
Cartwright	Queen's Hospital v.	52
Castle, J. B., In re.		436
Castle, J. B., In re.		484
Castle	McCandless v.	515
Castle	Williams v.	337
Cathcart	Middleditch v.	299
Cathcart	Middleditch v.	410
Cathcart	Mills v.	387
Chandler v.	Mott-Smith	225
Chandler v.	Secretary Ter. of Hawaii..	225
Charman v.	Charman	380
Chillingworth	See Kong v	428
Ching Lum v.	Lam Man Beu	363
Ching Tam Shee v.	Hall	190
Ching Tam Shee v.	Oriental Life Ins. Co.	663
Chong Chak Lai.	Territory v.	437
City and County Sheriff.	Atcherley v.	511
Colburn v.	Holt	65
Com. Public Lands.	Hapai v.	1
Correra v.	Correra	326
Coster v.	County Treasurer	352
Coster v.	Trent	352
County of Hawaii.	Matsumura v.	18
County of Hawaii.	Matsumura v.	197
County of Hawaii.	Matsumura v.	496
County of Maui.	Robello v.	168
County Treasurer	Coster v.	352
County Treasurer	Robinson v.	9

CASES REPORTED.

vii

Dillingham v.....Scott	421
Dillingham v.....Scott	554
Dowsett Co. v.....McCandless	430
Emmeluth v.....Board of Supervisors	171
Estate of Ahi.....	232
Estate of Alexandre.....	551
Estate of Barete	329
Estate of Brash.....	522
Estate of Campbell-Parker.....	393
Estate of Galbraith	415
Estate of Hall.....	531
Estate of Holmes v.....Fujitani	574
Estate of R. W. Holt.....	78
Estate of D. Kamaipiialii.....	163
Estate of Kauhi.....	359
Estate of Lopez.....	620
Estate of Robert Love, In re.....	154
Estate of Williams.....	515
Estate of Winam.....	190
Estate of Winam.....	663
Ewa Plant. Co. v.....Tax Assessor	72
Fern	Kulike v..... 278
Ferreira v.....Kamo	162
Ferreira v.....Kamo	187
Ferreira v.....Kamo	317
First. Am. Savings & Trust	
Co. of Hawaii v.....Treasurer	262
Fitchie v.....Brown	415
Fujitani	Estate of Holmes v..... 574
Galbraith, Will of.....	415
Haiku Fruit & Packing Co.,	
In re Taxes of.....	193
Haiku Fruit & Packing Co.,	
In re Taxes of.....	230
Hall	Ching Tam Shee v..... 190
Hall, Estate of.....	531
Hao v.....Hutchinson Sugar Plant Co.	315
Hapai v.....Com. Public Lands.....	1

Hapai v.....Pratt	1
Hart	Sachs Co. v..... 494
Hawaii, County of.....	Matsumura v..... 18
Hawaii, County of.....	Matsumura v..... 197
Hawaii, County of.....	Matsumura v..... 496
Hawaiian News Co. v.....	McBride
Hawaiian Pineapple Cos., In re Taxes of.....	193
Hawaiian Pineapple Cos., In re Taxes of.....	230
Henry v.....	Shields
High Sheriff v.....	Shields
Hilo Fruit & Packing Co., In re Taxes of.....	193
Hodson v.....	Wolters
Holmes	Brown v..... 268
Holmes, Estate of v.....	Fujitani
Holt	Colburn v..... 65
Holt, R. W., In re Estate of.....	78
Honolulu Packing Co., In re Taxes of	193
Honolulu Packing Co., In re Taxes of	230
Honolulu Plant. Co.	McCandless v..... 239
Humphreys v.....	Mello
Hustace	Supt. Pub. Works v..... 561
Hustace	Territory v..... 561
Hutchinson Sug. Plant. Co. Hao v.....	315
In re Atcherley.....	346
In re Atcherley.....	535
In re Atcherley.....	576
In re Atcherley.....	647
In re J. B. Castle.....	436
In re J. B. Castle.....	484
In re Estate of Ahi.....	232
In re Estate of Alexandre.....	551
In re Estate of Barete.....	329
In re Estate of Brash.....	522
In re Estate of Campbell- Parker	393
In re Estate of Galbraith.....	415

CASES REPORTED.

ix

In re Estate of Hall.....	531
In re Estate of R. W. Holt.....	78
In re Estate of D. Kamaipii- alii	163
In re Estate of Kauhi.....	359
In re Estate of Lopez.....	620
In re Estate of Robert Love.....	154
In re Estate of Williams.....	515
In re Estate of Winam.....	190
In re Estate of Winam.....	663
In re Lewers & Cooke.....	47
In re Lewers & Cooke.....	334
In re Maunakea.....	218
In re Mills.....	88
In re O. R. & L. Co.....	544
In re Peck	181
In re Taxes Ewa Plant. Co.....	72
In re Taxes Makee Sugar Co.....	331
In re Taxes Pineapple Cos.....	193
In re Taxes Pineapple Cos.....	230
Jarrett, Atcherlev v.....	511
Kalaeokekoi v.....Wailuku Sugar Co.	366
Kalamakee v.....Wharton	472
Kaleikini v.....Waterhouse	359
Kamaipiialii, D., Estate of.....	163
Kamo	162
Kamo	187
Kamo	317
Kane v.....Medeiros	564
Kauai Fruit & Land Co., In re Taxes of.....	193
Kauhane v.....Laa	223
Kauhane v.....Laa	526
Kauhi, Estate of	359
Kauhimahu v.....Kauhimahu	378
Kauhimahu	463
Kekipi	471
Kellogg	636
Koloa Sugar Co.	106
Kona Development Co. v....Scott	585

Kuhaupio	Paris v.....	657
Kulike v.....	Fern	278
Laa	Kauhane v.....	223
Laa	Kauhane v.....	526
Lam Man Beu.....	Ching Lum v.....	363
Lam Yip Kee.....	Territory v.....	565
Lansing	McCandless v.....	467
Lansing	McCandless v.....	474
Lau Dan v.....	Ah Leong	417
Lawson	Carpenter v.....	433
Lazarus v	Rosewarne	441
Lee Chuck	Brown v.....	4
Levi v.....	Makalei	565
Lewers & Cooke, In re.....		47
Lewers & Cooke, In re.....		334
Lloyd v.....	Territory	491
Lloyd v.....	Territory	520
Lloyd v.....	Territory	549
Lopez, Estate of.....		620
Love Estate, Robt., In re.....		154
Love Estate, Robt. v.....	Treas.	154
Lowrie v.....	Baldwin	258
Lowrey v.....	Territory	123
Lowrey v.....	Territory	179
Lucas	Tax Assessor v.....	350
Lucas	Territory v.....	162
Lucas	Wilder v.....	350
Maga	Territory v.....	157
Makalei	Levi v.....	565
Makaneole	Pelcaumoku v.....	68
Makee Sugar Co., In re		
Taxes		331
Maria	Scott v.....	389
Maria	Scott v.....	553
Martello v.....	Martello	243
Martin	Territory v.....	201
Matsubara	Territory v.....	641
Matsumura v.....	County of Hawaii	18
Matsumura v.....	County of Hawaii	197
Matsumura v.....	County of Hawaii	496

CASES REPORTED.

xi

Maui, County of	Robello v.	168
Maunakea, In re		218
McBride	Hawaiian News Co. v.	625
McBryde Sugar Co. v.	Koloa Sugar Co.	106
McCandless v.	Castle	515
McCandless	Dowsett Co. v.	430
McCandless v.	Honolulu Plant Co. & Wood- lawn Fruit Co.	239
McCandless v.	Lansing	467
McCandless v.	Lansing	474
Medeiros	Kane v.	564
Mejea v.	Whitehouse	159
Mello	Humphreys v.	468
Mendonca	Mills v.	357
Mia v.	Kekipi	471
Middleditch v.	Cathcart	299
Middleditch v.	Cathcart	410
Mills v.	Cathcart	387
Mills v.	Mendonca	357
Mills, In re.		88
Mott-Smith	Chandler v.	225
Muranaka	Territory v.	321
Nahea	Warren v.	382
Naka	Archer v.	547
Nakookoo v.	Noholoa	667
Nakookoo v.	Noholoa	679
Noholoa	Nakookoo v.	667
Noholoa	Nakookoo v.	679
Oahu Sugar Co.	Bishop Trust Co. v.	183
Ontai	Richards v.	451
Oriental Life Ins. Co.	Ching Tam Shee v.	663
O. R. & L. Co., In re.		544
O. R. & L. Co. v.	Treasurer	544
O. R. & L. Co.	Waialua Agr. Co. v.	446
Paris v Kuhaupio.		657
Pearl City Fruit Co., In re		
Taxes of		193
Pearl City Fruit Co., In re		
Taxes of		230

Peck, In re.....	181
PedroScott v.....	389
PedroScott v.....	553
Peleaumoku v.....Makaneole	68
Pineapple Cos., In re Taxes of	193
Pineapple Cos., In re Taxes of	230
PottieTerritory v.....	99
PrattHapai v.....	1
Queen's Hosp. v.....Cartwright	52
RaymondAhoy v.....	568
RaymondAhoy v.....	627
Remington Typewriter Co. vKellogg	636
Richards v.....Ontai	451
Robello v.....County of Maui	168
Robinson v.....Baldwin	9
Robinson v.....County Treasurer	9
RosewarneLazarus v.....	441
Sachs Co. v.....Hart	494
Savidge v.....Antone	329
SchaeferTerritory v.....	214
SchnackBooth v.....	659
ScottDillingham v.....	421
ScottDillingham v.....	554
ScottKona Development Co. v...	585
Scott v.....Maria	389
Scott v.....Maria	553
Scott v.....Pedro	389
Scott v.....Pedro	553
Scott v.....Territory	578
Scott v.....Territory	580
Secretary Ter. of Hawai...Chandler v.....	225
See Kong v.....Chillingworth	428
Shaw v.....Boyd	83
Sheriff of Honolulu.....Atcherley v.....	511
ShieldsHenry v.....	302
ShieldsHigh Sheriff v.....	302
Sing HighTerritory v.....	628

CASES REPORTED.

xiii

Sociedade de San Antonio..	Cardozo v.....	319
Supt. Pub. Works v.....	Brown	41
Supt. Pub. Works v.....	Campbell-Parker	41
Supt. Pub. Works v.....	Hustace	561
Supervisors, Board of.....	Emmeluth v.....	171
Sylva v.....	Wailuku Sugar Co.	385
Sylva v.....	Wailuku Sugar Co.	602
Sylva v.....	Wailuku Sugar Co.	681
Tax Assessor	Ewa Plant. Co. v.....	72
Tax Assessor v.....	Lucas	350
Tax Assessor	Makee Sugar Co. v.....	331
Taxation of Pineapple Cos.....		193
Taxation of Pineapple Cos.....		230
Tax. Com. v.....	Auditor	181
Territory v.....	Brown	41
Territory v.....	Campbell-Parker	41
Territory v.....	Carter	198
Territory v.....	Chong Chak Lai	437
Territory v.....	Hustace	561
Territory v.....	Lam Yip Kee	565
Territory	Lloyd v.....	491
Territory	Lloyd v.....	520
Territory	Lloyd v.....	549
Territory	Lowrey v.....	123
Territory	Lowrey v.....	179
Territory v.....	Lucas	162
Territory v.....	Maga	157
Territory v.....	Martin	201
Territory v.....	Matsubara	641
Territory v.....	Muranaka	321
Territory v.....	Pottie	99
Territory v.....	Schaefer	214
Territory	Scott v.....	578
Territory	Scott v.....	580
Territory v.....	Sing High	628
Territory v.....	Toyota	651
Territory v.....	Trent	352
Thompson v.....	Auditor	181
Toyota	Territory v.....	651
Treasurer	Atherton v.....	340

Treasurer County of Maui..	Robinson v.....	9
Treasurer	First Am. Savings & Trust Co. of Hawaii v.....	262
Treasurer of Honolulu.....	Coster v.....	352
Treasurer	Robt. Love Estate v.....	154
Treasurer	O. R. & L. Co. v.....	544
Treasurer	Trust Co. v.....	262
Trent	Coster v.....	352
Trent	Territory v.....	352
Trust Co. v.....	Treasurer	262
Vivas v.....	Kauhimahu	463
Wahiawa Con. Pineapple Co., In re Taxes of.....		193
Wahiawa Con. Pineapple Co., In re Taxes of.....		230
Waialua Agr. Co. v.....	O. R. & L. Co.	446
Wailuku Sugar Co.	Kalaeokekoi v.....	366
Wailuku Sugar Co.	Sylva v.....	385
Wailuku Sugar Co.	Sylva v.....	602
Wailuku Sugar Co.	Sylva v.....	681
Wailuku Sugar Co.	Waldeyer v.....	244
Wailuku Sugar Co.	Waldever v.....	245
Waldeyer v.....	Wailuku Sugar	244
Waldeyer v.....	Wailuku Sugar	245
Warren v.....	Nahea	382
Waterhouse	Bierce v.....	398
Waterhouse	Bierce v.....	594
Waterhouse	Kaleikini v.....	359
Wharton	Kalamakee v.....	472
Whitehouse	Mejea v.....	159
Wilder v.....	Lucas	350
Williams v.....	Castle	337
Williams, Estate of.....		515
Will of Galbraith.....		415
Winam, Estate of.....		190
Winam, Estate of.....		663
Wolters	Hodson v.....	342
Woodlawn Fruit Co.	McCandless v.....	239

CASES DECIDED
BY THE
SUPREME COURT
OF THE
TERRITORY OF HAWAII

G. W. A. HAPAI v. JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED MARCH 30, 1908.

DECIDED APRIL 6, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

PUBLIC LANDS—*right to patent by lessee of right of purchase lease.*

A lessee under a right of purchase lease of public lands who applies for a patent satisfies the statutory prerequisite that he "has resided thereon not less than two years" by showing that he has for that period maintained on the premises a permanent and fixed abode with the present intention there to remain.

OPINION OF THE COURT BY WILDER, J.

The application of G. W. A. Hapai, the lessee under a right of purchase lease from the Territory, for a land patent of the land covered by the lease, which was situated in Olaa, Hawaii, and contained 27.10 acres, having been refused by the com-

Hapai v. Pratt, 19 Haw. 1.

missioner of public lands on the ground that the applicant had not resided on the land for two years and had not continuously maintained his home thereon, the matter was referred to the circuit judge of the fourth circuit pursuant to Sec. 274 R. L., who entered a decree ordering the defendant to issue the patent as prayed for. The defendant appealed.

R. L. Sec. 322 provides that "At any time after the third year of the said term, the lessee shall be entitled to a land patent from the government conveying him in fee simple the land described in his lease, upon his paying to the government the appraised value of the premises as set forth in such lease, if he has reduced to cultivation twenty-five per cent. of said premises and has resided thereon not less than two years, and has substantially performed all other conditions of his lease," one of the conditions of the lease being that "the lessee shall, from the end of the first year of the said term, to the end of the fifth year thereof continuously maintain his home on such premises." R. L. Sec. 319.

The uncontradicted evidence in the case shows that plaintiff commenced living on the land in April or May of 1902, shortly after the execution of the lease, and thereafter, except when prevented by sickness or bad weather, he usually lived there from Saturdays to Mondays and on holidays, but never staying more than three or four days at a time. At other times than those he lived in his Hilo home, his business, that of district magistrate of Hilo, requiring his presence there. Hilo is about thirteen miles from the land in question. Plaintiff's wife lived on the land for various periods running from a week to a month at a time, occupying the place in all about half of each year, and his children occupied the place during school vacation times. Plaintiff built a house on the land during the first year of his tenancy. He has cultivated almost all of the land with bananas, pineapples, coffee, flowers, vegetables and fruit trees. He has always kept a caretaker

Hapai v. Pratt, 19 Haw. 1.

on the premises. His intention was to make the place his home and to live there all of the time when his work did not necessitate his presence in Hilo. All his savings went toward improving the place. In 1906, after the application for a patent, he voted in Olaa, previous to that time voting in Hilo. If all of the times the place was occupied by plaintiff, his wife and family were added together it would make about two years.

Plaintiff is entitled to a patent if, as the statute provides, he has resided on the land not less than two years and has substantially performed all of the other conditions of his lease, the only other condition in this case which is claimed was not fulfilled being the one that "the lessee shall from the end of the first year of the said term to the end of the fifth year thereof continuously maintain his home on such premises." It will be observed that that condition in the lease cannot be performed to its full extent by a lessee who shortly after the third year of his term applies for a patent, otherwise he could not get a patent until after the fifth year of his term. So that, so far as the right to a patent is concerned, if the lessee has resided on the land for not less than two years, it is immaterial to inquire whether the condition as to continuously maintaining a home thereon has been carried out. This is also shown by the statute requiring as prerequisites to obtaining a patent a residence on the land of not less than two years and a substantial performance of all "other" conditions of the lease. To reside on certain premises and to continuously maintain a home thereon do not mean the same thing, as a person may do either one without doing the other.

All that is necessary to decide in this case, however, is whether plaintiff has resided on the land for not less than two years. The contention of defendant is that plaintiff, in order to prevail, must show that he has maintained on the premises for not less than two years a permanent and fixed abode with

Hapai v. Pratt, 19 Haw. 1.

the present intention there to remain. Even if this contention goes too far, plaintiff has shown by undisputed evidence all that is required by it. That plaintiff also maintained a home in Hilo, where he lived when absent on business from his Olaa place, is not sufficient in this case to show a noncompliance with the statute, whatever its effect might be in some other case. In so far as the conclusion depends upon a question of fact, the finding of the circuit judge is in favor of plaintiff, and while that finding is not binding on this court it is certainly entitled to weight. We may add that, if it appeared in any way, as it does not in this case, that the compliance with the condition as to residence was not made in good faith, a different conclusion might follow.

The decree appealed from is affirmed.

C. F. Clemons (*Thompson & Clemons* on the brief), for plaintiff.

W. L. Whitney, Deputy Attorney General (*C. R. Hemenway*, Attorney General, also on the brief,) for defendant.

ARTHUR M. BROWN v. LEE CHUCK, TAI KONG, CHANG WONG, LUM CHOY, HOP GIP, YONG TONG, LEE SUM, KO KAN, HO YAU, AH TAI, TONG KWONG, AH JACK, AH FAT, MAU LEONG, TIN YEE, AKANA, AH PACK, LUM LOOK, CHING SANG, AH MING, AH FOOK, LEE CHING, Y. AH PEU, YOON LUNG, CHO KON, TUNG CHING, LUM TAI, CHUNG KET, PAK FOO, AH ON, CHANG CHEONG, CHONG WO, AH KAU, YEE LING, AH LONG, CHING FOON, AH TUCK, YEE SING, PAU LING, CHING WO, CHOONG SOON, TING CHEONG, TAU TAI, AH ING, YIM KWONG, AH NAU, LONG JOHN, SING CHONG, CHANG HOONG, LEE CHOON, PAU CHAI, AH LEE, CHING HIM, LOO CHUNG, AH LOOK, HOO SONG,

APRIL, 1908.

5

Brown v. Lee Chuck, 19 Haw. 4.

LEE SUNG, YONG TAI, NEE SO, CHONG HOOK,
YIP YAN, AH CHEONG, AH HANG, CHONG SEE
AND AH TUCK.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 2, 1908.

DECIDED APRIL 14, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

BAIL—parties to action on bond.

In the absence of statute action on a bail bond is properly brought by the obligee though his term of office as sheriff has expired.

BAIL—condition of bond—notice to principals.

A bail bond being conditioned for the appearance of the principals upon the opening day of a court term and "thereafter from day to day and time to time as ordered or directed," an order in open court for the appearance of the principals with notice thereof to the surety is sufficient to sustain an action for default.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action to recover the sum of \$1625 upon a bail bond executed November 27, 1906, by the defendant Lee Chuck, as surety, and the other defendants, sixty-five in number, as principals, the latter having been convicted in the district court of Honolulu of being present where gambling games were carried on and sentenced to a fine of \$25 each and costs from which they appealed to the circuit court. Upon the trial on appeal, January 25, 1907, the principals named in the bond were again convicted and their motion for a new trial was denied. They then brought here a bill of exceptions which they withdrew August 28, 1907, and an order was thereupon made October 17, and transmitted to the circuit court, dismissing the exceptions. December 11, 1907, the circuit court made an order that the defendants—the principals on the bond—appear December 13 at 10 o'clock a. m. and that Lee

Brown v. Lee Chuck, 19 Haw. 4.

Chuck, the surety, be notified of the order by serving upon him a certified copy, which was done the same day. The defendants having failed to appear as ordered their default was noted December 13 and it was adjudged that their bond be forfeited. Lee Chuck, the only defendant served with process in the action, filed a general demurrer to the complaint which was sustained. The plaintiff excepted and for a more speedy determination of this cause the court allowed an interlocutory bill of exceptions for the purpose of presenting to this court the questions raised by the demurrer. The bill, however, is not interlocutory in its nature.

The argument by the defendant is (1) that the plaintiff had no legal capacity to sue since his office as sheriff was occupied by another person when the action was brought and (2) that the order requiring the defendants to appear was made without notice to them and hence was void, and that the order declaring the bond to be forfeited, having been made without notice to the principals named in the bond, was of no effect.

It is admitted "that the general rule at common law was that only the obligee or his personal representative could sue on a bond," but it is claimed that "there exists no statute in Hawaii which would specifically apply to the case at bar" and that "the whole current of legislation in these islands relative to actions on bonds shows that the custom and practice that the real party must sue for the enforcement of an obligation exists here and is a part of our law." The legislation referred to is Sec. 1561 R. L. providing that any person injured may bring an action for breach of the condition of a sheriff's bond for faithful performance of his duties, and Sec. 1887 R. L. allowing an action to be brought in the name of the clerk of the judiciary department for the use of any person for whose benefit a statutory appeal bond is made, which is required "to run to the clerk of the judiciary department and to his successors in such office."

Brown v. Lee Chuck, 19 Haw. 4.

Except in allowing an action on a sheriff's bond to be brought by a person whose pecuniary interest is affected by breach of its conditions the statutes of Hawaii have not changed the common law rule that an action on a bond must be brought by the obligee whether he is the real person in interest or not. It was because of the rule being in force that a statute was required in order to enable a person interested to sue on a sheriff's bond. In the other instance cited by the defendant it is not the party in interest who is allowed to sue on an appeal bond but the official to whom it runs. All the cases cited in the defendant's brief upon this question appear to be based upon statutes requiring an action to be brought by the real party in interest and that actions on official bonds shall be brought in the name of the state or that they may be brought by a successor in office or else are based merely on the practice of the court. We are aware of no case in our practice in which the common law rule has not been observed and this practice conforms to the statute declaratory of the common law. Sec. 1 R. L. The bond was made to Brown as county sheriff and not to him and his successors in office and the action then was properly brought in his name.

The second question presented by the defendant in support of his demurrer is whether the condition of the bond that the principals named in it would appear at the opening day of the court at its next term and "thereafter from day to day and time to time as ordered or directed" meant or required that if an order for their appearance should be made while they were not in attendance at some other day than at the opening day of the term or a day certain to which their cause was continued they would be served with a copy or otherwise officially notified of the order. After their conviction in January until withdrawal of their exceptions the following August they would have been in the custody of the officer, as their fines were not paid, but for their bond for appearance which, by Sec. 2776

Brown v. Lee Chuck, 19 Haw. 4.

R. L., continued until final determination of any subsequent proceedings in the cause. They had appointed the defendant their custodian and he had made himself responsible for their appearance. If they had escaped he would not for that reason have been released from liability although if they were prevented by illness from attending when ordered or if death had intervened his obligation would have been discharged. If he was unable to notify them of the order it would be improbable that an officer would have found them. The surety could easily have notified his principals or else have shown to the court his inability to do so and requested an official search, although upon a return that the officer could not find them the surety would have been liable. Was it not then the duty of the surety to notify his principals and produce them or show why they could not appear?

The bond in this case was joint and several. Notice to one of several persons having common interests in the same subject matter operates as notice to all as, for instance, in cases of notice to one of several trustees of an estate.

The cases cited by the defendant in which notice was, "under the condition of the bond, a prerequisite to an appearance (5 Cyc. 125), are a Louisiana case in which the condition was to appear "when called on;" a New York case to appear from time to time as directed; an Arkansas case in which the prisoner was told that he would be notified.

It would have been better, perhaps, if the court had ordered service upon the other defendants of the order requiring their appearance, but it is not apparent that the rights of the surety have been prejudiced by the omission.

Exceptions sustained, order sustaining demurrer vacated.

W. L. Whitney, Deputy Attorney General (*M. F. Prosser* on the brief), for plaintiff.

R. W. Breckons and *W. W. Thayer* for defendants.

APRIL, 1908.

9

Robinson v. Baldwin, 19 Haw. 9.

W. T. ROBINSON, A CITIZEN AND TAXPAYER OF THE COUNTY OF MAUI, TERRITORY OF HAWAII, ON HIS OWN BEHALF, AND ON BEHALF OF ALL AND SINGULAR THE CITIZENS AND TAXPAYERS OF SAID COUNTY, *v.* L. M. BALDWIN, AS TREASURER OF THE COUNTY OF MAUI, TERRITORY OF HAWAII.

SUBMISSION ON AGREED FACTS.

ARGUED MARCH 27, 1908.

DECIDED APRIL 21, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

COUNTIES—*bonds—limitation with respect to taxable property.*

The limitation in Sec. 55 of the Organic Act of bonded indebtedness of a subdivision of the Territory to a certain percentage of the assessed value of taxable property of such subdivision refers to property taxable by such subdivision, and a county without the power of taxation has no power to issue bonds.

OPINION OF THE COURT BY HARTWELL, C.J.

The parties seek an adjudication upon the validity of certain bonds of the County of Maui proposed to be issued under Act 139 S. L. 1907, entitled "An Act to Authorize an Issue of Bonds by the County of Maui, in the Sum of One Hundred Ten Thousand Dollars, under the Provisions of Act Sixty-Five of the Session Laws of Nineteen Hundred and Seven."

The agreed facts are mainly those which are set forth or referred to in Act 139, which was vetoed by the governor and passed over the veto, and in Act 65 S. L. 1907, entitled "An Act to Enable the Counties to Provide for County Loans." The governor's veto of Act 139 was based on the first objection made by the plaintiff, namely, that the provision in Sec. 4 that the act take effect upon the date of its approval by the president of the United States was an unlawful delegation of legislative power.

Robinson v. Baldwin, 19 Haw. 9.

The other grounds on which the plaintiff contests the issuing of the bonds are in substance as follows: That Acts 65 and 139, authorizing county bonds and making their payment a charge upon county revenues, conflict with Act 52 S. L. 1903, Act 55 S. L. 1905 and Act 41 S. L. 1907, authorizing territorial bonds and making their payment a charge upon the consolidated revenues of the Territory, by impairing the obligation of the territorial bonds; that Act 65, authorizing the treasurer of each county to issue bonds of the county, does not authorize the county to issue them; that the resolution of the board of supervisors, referred to in Act 139, authorizing the issue of bonds "redeemable in not more than five years and payable in not more than fifteen years from date of issue," does not comply with Sec.3 of Act 65 requiring that no bonds be issued until a resolution authorizing the issue thereof, setting forth amongst other things "the term of the proposed bond issue," shall have been passed by the supervisors of the county and confirmed by an act of the legislature approving and permitting such proposed issue.

Act 65 was approved and became law April 16, 1907, and it appears from Act 139 that the resolution of the board of supervisors making the bonds payable in not more than fifteen years from date of issue was adopted April 17. The agreed statement shows that March 14, 1908, the board of supervisors passed a resolution definitely fixing the term of the bonds by making them payable in fifteen years from date of issue.

The plaintiff also claims that the first resolution of the board of supervisors was invalid by reason of the absence at its meeting of one of its members who had received sufficient notice of the meeting and was too ill to attend, but approved of the resolution and would have voted for it if he had been able to be present. Finally, the plaintiff contends that the bonds were not officially approved by the president by signing his name without official designation to the following statement:

Robinson v. Baldwin, 19 Haw. 9.

"December 18, 1907. By virtue of the power in me vested by Section Fifty-five of the Act of Congress approved April thirtieth, A. D. Nineteen Hundred, (31 Statutes at Large, page 141), I hereby approve the incurrence of debt and issue of bonds in the sum of one hundred and ten thousand dollars by the County of Maui, Territory of Hawaii, pursuant to authority conferred on said Maui County by Acts of the Legislature of said Territory of April 16, 1907, (No. 65), and May 1, 1907, (No. 139)."

Another possible objection to the issue of the bonds is suggested by the provision in Sec. 3, Act 139, "Nothing in this Act contained shall be held in any manner to authorize or empower said county to levy or impose taxes," and the limitation placed by the Organic Act, Sec. 55, upon indebtedness which may be contracted "by or in behalf of the Territory or any political or municipal corporation or subdivision thereof." The limitation is thus expressed: "The total of such indebtedness incurred in any one year by the Territory or any subdivision shall not exceed one per centum upon the assessed value of taxable property of the Territory or subdivision thereof, as the case may be, as shown by the last general assessment for taxation, and the total indebtedness for the Territory shall not at any time be extended beyond seven per centum of such assessed value, and the total indebtedness of any subdivision shall not at any time be extended beyond three per centum of such assessed value." Act 65 limits the total indebtedness which may be incurred by any county to "three per centum of the assessed value of the taxable property in such county," and the amount of the indebtedness which may be incurred in any one year to one per centum "of such assessed value." If the Organic Act limits indebtedness of a county to a percentage of property taxable by it then, as counties have no authority to tax, its bonds could not be issued.

The case presents but four questions which require serious consideration, namely: (1) The effect upon the Act 139, which authorized the bonds, of the provision for its taking effect upon

Robinson v. Baldwin, 19 Haw. 9.

the date of its approval by the president of the United States, the question being whether this is a delegation to the president of law making power; (2) the effect upon the bonds of the failure of the supervisors, prior to the enactment of Act 139, to fix the time for payment of the bonds; (3) whether making the county bonds a charge on the revenues of the county derived from the Territory affects the security of the territorial bonds the payment of which is a first charge upon the territorial revenues; (4) whether the Organic Act requires as a prerequisite to the issue of county bonds that there be property taxable by the county for securing their payment.

(1) By Sec. 49 Organic Act, Act 139 became a law when it was passed over the governor's veto. If its fourth section meant that the act would not go into operation until the president's approval, which merely fixed that time, then the approval was not a condition precedent to the act becoming law and the section is not an attempt to place legislative responsibility upon the president or to delegate to him any portion of legislative power. By Sec. 55 Organic Act territorial or county indebtedness could not be incurred until approved by the president and by Sec. 1 of Act 139 the issue of bonds was subject to his approval so that the section was not required in order to authorize their issue. The mere postponement of the taking effect of an act until a stated time or until an event which may or may not occur does not render the act incomplete legislation. To require adoption of a legislative measure by popular vote in order that it take effect is generally considered a proper exercise of legislative power concerning local matters as, for instance, in restricting liquor sales or authorizing municipal bonds for stated purposes which are instances of submission to the voters of the desirableness of accepting or declining a legislative enactment according as they shall deem it to be desirable or not. A majority of the court think that the fourth section is not intended to require the president's approval in order that the act

Robinson v. Baldwin, 19 Haw. 9.

should become law and therefore is not an attempted delegation of law making power but is intended merely to fix the time when the law would go into operation, or else that it refers to the approval required by the Organic Act and expressed in Sec. 1 authorizing the issue of the bonds "subject also to the approval of the president of the United States," and that in any of these meanings the section does not invalidate the rest of the act which is complete in itself it being "elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Pollock v. Farmers' Loan & Trust Co.* 158 U. S. 635.

(2) The resolution of the board of supervisors does not strictly comply with the requirement of Sec. 3 Act 65 S. L. 1907 as to fixing the "term" of the bond issue, but Act 139, which recites the resolution and refers to it as "in accordance with the provisions of said Act 65," authorizes the treasurer to issue bonds "under and in accordance with the provisions of Act 65." This may be considered as showing that the legislature regarded the resolution as a sufficient compliance with Act 65 or as dispensing with a literal compliance in this respect, the act not being in the nature of a fundamental law but being subject to modification or amendment.

(3) The third ground is entirely untenable since the first charge upon the territorial revenues would be the territorial bonds. The county bonds, although charged upon county revenues derived from territorial revenues, would necessarily be a second charge.

(4) The most difficult question in the case is whether the limitation of indebtedness which a county as a subdivision of the Territory may incur in any one year (Organic Act Sec. 55), namely, one per centum upon the assessed value of taxable property of the county shown by the last general assessment

Robinson v. Baldwin, 19 Haw. 9.

for taxation, implies that the property upon the assessed value of which the amount of indebtedness is determined shall be taxable by the county. Ordinarily a power to issue municipal bonds implies power to levy taxes for their payment. *Citizens' Sav. & Loan Ass'n. v. City of Topeka*, 87 U. S. (20 Wall.) 655; *U. S. City of New Orleans*, 98 U. S. 381; *Ralls County Court v. U. S.*, 105 U. S. 735; *City of Quincy v. Jackson*, 113 U. S. 335.

The act of July 30, 1886, ch. 818, 24 Stat. L. 170, limits general territorial indebtedness which may be incurred for the erection of penal, charitable or educational institutions to "one per centum upon the assessed value of the taxable property in such Territory as shown by the last *general assessment for taxation*," while the limit of indebtedness of municipal corporations is "four per centum of the value of the taxable property within such (municipal) corporation, county or subdivision to be ascertained by the last assessment for territorial and county taxes." These provisions are quoted from Secs. 3 and 4 of the act, the former section declaring that "no law of any territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory" except for the purposes and within the limits therein named, and the latter "that no political or municipal corporation, county or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose" except to the limit named.

The act of March 4, 1898, ch. 35, 30 Stat. L. 252, amends the act of 1886 by authorizing bonds by chartered municipal corporations with a population of not less than one thousand persons for sanitary and health purposes, sewers, water works and street improvements, requiring that no bonds be issued by any city or town unless upon a vote of two-thirds of its qualified voters, each of whom must be "owner of real or personal property subject to taxation within the municipality."

Robinson v. Baldwin, 19 Haw. 9.

The two sections of the act of 1886 providing for territorial and municipal indebtedness are condensed in the Organic Act into one paragraph. If the limit of indebtedness of the Territory and of the counties, respectively, were therein expressed to be a percentage upon the assessed value of the "taxable property of each as shown by *its* last general assessment for taxation" it would appear that county assessment, meaning taxes assessed by the county, would be required for county bonds.

The inference that in limiting county as well as territorial indebtedness to a percentage of the taxable property of the county or Territory, respectively, congress intended property taxable by the county or Territory, whichever should issue the bonds, is supported by the fact that such limitations are almost invariably referred to the value of taxable property as a standard, not merely as furnishing a convenient figure but "in relation to the sources of payment" (*Litchfield v. Ballou*, 114 U. S. 190), that is, to the power of taxation by the municipality itself.

If the provisions of the Organic Act of this Territory, limiting indebtedness which may be incurred by the Territory or any subdivision thereof to a percentage of the assessed value of the taxable property of the Territory or subdivision as shown by the last general assessment for taxation, have a different meaning from nearly identical expressions in other acts of congress on the subject, which appear to restrict county indebtedness to a percentage of the property taxable by the county, then the Organic Act was intended to establish a system of local self government radically different from that of the other Territories.

If other methods than taxation are provided for payment bondholders cannot complain that insufficient security is thereby furnished or that a levy of taxes for their payment cannot be compelled. They know before they take the bonds what

Robinson v. Baldwin, 19 Haw. 9.

the security is. When power to tax is unnecessary for the purpose of providing counties with "means to discharge their pecuniary obligations" (*U. S. v. New Orleans*, supra, 393), it may be said that there is no implication that in the grant by congress of legislative power to authorize county bonds or in the limitation upon the extent of such bond issues power to tax is "necessarily an ingredient of such a power to contract, as ordinarily political bodies can only meet their obligations through the instrumentality of taxation." *Ralls County Court v. U. S.* supra, 736. Thus in *U. S. v. Macon*, 99 U. S. 582, a sinking fund consisting of one-twentieth of one per cent. on the taxable property of the county was provided for the payment of certain county bonds issued in payment of railroad stock. The court held that the implication that the legislature in authorizing the county to incur the extraordinary debt intended to grant it full power to tax for the payment of the debt "was repelled by the special provision for the tax of one-twentieth of one per cent. and the case is thus brought directly within the maxim *expressio unius est exclusio alterius*."

By Sec. 10 Act 65 S. L. 1907, entitled "An Act to Enable the Counties to Provide for County Loans," upon default in payment of bonds the holder may bring an action against the defaulting county "and should any moneys be then or thereafter payable by the Territory of Hawaii to the County defendant in such action" a garnishee process may issue against the auditor of the Territory and, by Sec. 12, from the time of service "it shall be unlawful for such garnishee to draw, sign or issue any warrant payable to the order of the County defendant or any of its officers or permit or cause the same to be done, for any moneys which may be then or thereafter payable to such defendant until the action shall have been finally determined and judgment therein rendered, if any, shall have been fully paid," and "all moneys due or to become due to such defendant shall be held in the Treasury of the Territory

Robinson v. Baldwin, 19 Haw. 9.

from the time of such service until such final judgment" to an amount sufficient to meet the demand. By Sec. 1 of Act 93 "Fifty per centum of the total amount of poll and school taxes and taxes on property and incomes collected in each County shall be paid by the Treasurer of the Territory to such County" upon monthly warrants by the auditor of the Territory in favor of the county treasurer, and, by Sec. 2, "The funds realized from such warrants shall be applied by each County Treasurer to the payment of the expenses of his respective County." By Act 121 S. L. 1907 the treasurer of each county is authorized to establish as a special deposit in the treasury of his county a sinking fund to pay any present or future bonded indebtedness of the county and is required to transfer from its current receipts and deposit to the credit of the sinking fund such an amount of money as will, compounded annually at the rate of interest specified in the bonds, amount in the unexpired term thereof to the full face value of such bond issue.

Future legislative enactments which would substantially lessen this security for payment of county bonds would be liable to be treated as invalid under the constitutional prohibition of state legislation impairing the obligation of contracts which may be applicable under the provision in the Organic Act, Sec. 5, that the constitution "shall have the same force and effect within the said Territory as elsewhere in the United States."

But while the foregoing provisions seem to make it unnecessary for counties to have power to tax themselves in order to obtain money for paying their bonded indebtedness, yet if the Organic Act intends that county bonds shall be payable out of self imposed county taxes and not out of territorial taxes voted by the legislature, then, in the absence of power in the county to levy taxes for their payment, the issue of its bonds must be treated as unauthorized by the Organic Act. If it be said that this is a strict construction of the limitation imposed by

Robinson v. Baldwin, 19 Haw. 9.

law this is the rule generally adopted in construing restrictions upon municipal powers to incur debt. 1 Abbott, Mun. Corp. Sec. 151.

"These restrictions have been found necessary because of the mania possessed apparently by all public corporations to incur debts without regard to the means or source of payment. To restrict and limit the capacity for municipal extravagance the courts have upheld their constitutionality whenever called in question and applied to them the strict rules of construction." Ib. Sec. 149.

Whatever may have been the object which congress had in view in prescribing the method of limiting the issue of county bonds by reference to property taxable by the county it is enough to say that such limitation clearly appears to have been made.

On the fourth ground above mentioned the plaintiff is entitled to an injunction restraining the defendant from issuing the bonds.

A. Lewis, Jr. (*Smith & Lewis* on the brief), for plaintiff.

J. L. Coke (*D. H. Case* with him on the brief) for defendant.

KUMAZO MATSUMURA v. COUNTY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED JANUARY 23, 1908.

DECIDED APRIL 28, 1908

HARTWELL, C.J., WILDER AND BALLOU, JJ.

COUNTIES—*liability for torts.*

A county in Hawaii is liable for injury to private property in the nature of a trespass caused by the negligent act of a road employee while repairing a public highway.

Matsumura v. County of Hawaii, 19 Haw. 18.

OPINION OF THE COURT BY BALLOU, J.

(Wilder, J., dissenting.)

Plaintiff having brought an action of tort against defendant, a demurrer to the declaration was sustained and the case comes here on exceptions. The declaration alleges that one Keola, while employed as an agent and servant of the defendant in maintaining and constructing a public highway "did willfully, negligently and in total disregard of the rights and property of the plaintiff, divert the course of a large stream of water, then and there flowing in a certain wooden flume, that the said large stream of water so diverted by the agent and servant of the said defendant did rush with great force into and undermine a certain large mound or bank consisting of earth and rocks, by the force of the water diverted as aforesaid, was loosened from its foundations and by the forces of gravity moved from its said foundations and with great force, struck the store, dwelling house, stables and outhouses of the said plaintiff in such a manner that the said dwelling house, store, stables and outhouses, together with the contents thereof consisting of household furniture, cooking utensils, personal effects, stock of goods and merchandise, all the property of the said plaintiff, and of the total value of \$10,000.00, were utterly demolished and destroyed to the damage of the plaintiff in the sum of \$10,000.00."

The sole question for decision is whether the defendant is liable upon the facts alleged. Defendant was created a body corporate and politic by the county act of 1905 (S. L. 1905, Act 39.) It has power, among other things, "to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries," and "to do all things necessary and proper to carry into execution the foregoing." It also has power to sue and is liable to be sued in its corporate name.

Matsumura v. County of Hawaii, 19 Haw. 18.

The question of the liability of public corporations, such as cities, towns and counties, for various classes of torts is one upon which there is a wide divergence of opinion. The general rule of the common law to afford redress for wrongs suffered by individuals would seem to throw the burden of argument upon those who would exempt any corporation, public or private, from the general doctrine of liability for its torts. 1 Cooley, Torts, 3d ed. *141; 5 Thompson, Negligence, Sec. 5796. The numerous exceptions to this rule in the case of public corporations may be roughly classified as follows:

(1) Cases exempting the public corporation from liability on the ground that it is part of the sovereign power and cannot be sued without its consent. This exemption is usually allowed to counties (*Fry v. County of Albemarle*, 86 Va. 195; 9 S. E. 1004) and denied to cities, (*Rankin v. Buckman*, 9 Or. 253) a distinction without a difference. (*Eastman v. Clackamas County*, 32 Fed. 24.) Upon this principle the nature of the act complained of would be immaterial, the sovereign character of the defendant being a complete defense.

(2) Cases exempting the public corporation from liability for a class of acts called governmental in their nature, (*Hughes v. County of Monroe*, 147 N. Y. 49 but holding it liable for other acts called private or corporate. *Coburn v. San Mateo County*, 75 Fed. 520. Upon this principle the character of the defendant, whether city or county, would seem to be immaterial.

(3) Cases exempting the public corporation from liability on the ground that the relation of master and servant does not exist between the defendant and the officer directly responsible. (*Johnson v. City of Somerville* (Mass.) 81 N. E. 268.) This reason would seem to be independent both of the character of the defendant and the nature of the act, and to depend on the position and mode of appointment of the negligent officer.

(4) Cases in which the legislature has made specific enactments giving or withholding rights of action in certain cases.

Matsumura v. County of Hawaii, 19 Haw. 18.

Baltimore County Commissioners v. Wilson, 54 At. 71. These require no further mention than to be distinguished from mere legislative creation of the defendant corporation and the enumeration of its powers and duties, which still leaves the question of liability one of general law. It may be noted in this connection that the recent Municipal Act in disposing of cases which may be pending against the County of Oahu apparently assumes that actions for damages may have been brought (S. L. 1907, Act 118, Sec. 5.)

The two principal classes being those allowing exemption on account of the nature of the tort and those allowing exemption on account of the character of the defendant, it will be convenient to consider first as to whether a municipal corporation would be liable in this action, and, second, whether the County of Hawaii is exempt on account of its being a county.

The declaration is somewhat meager in its statement of the connection between the proposed repair of the highway and the diversion of the water which caused the damage to the plaintiff's land, and it is difficult to infer whether the injury was the necessary result of the diversion of the water or whether it arose from the negligent manner in which the act was done, but on either theory it states a cause of action as against a municipal corporation. It is true that while given the power to maintain highways the duty of doing so is not specifically enjoined upon the defendant (S. L. 1905, Act 39, Sec. 9), and therefore that no action would lie for nonfeasance in failing to exercise this power, but when the municipality undertakes to exercise such a power and its officers or agents do the work negligently or unskillfully any person damaged in consequence thereof may maintain an action against the municipality. 5 Thompson, Negligence, Sec. 5788.

Of the many confusing and usually indefensible exemptions from municipal liability none seems to fit this case. This is not a case of negligent failure to repair a public work but lack

Matsumura v. County of Hawaii, 19 Haw. 18.

of due care in the execution of work ordered by the corporation. 2 Cooley, Torts, 3d ed. *741. It is not the act of an elective or public officer of whom the relation of master and servant may be doubtful but of a servant selected by the supervisors themselves. 5 Thompson, Negligence, Sec. 5792. It is not the act of the county in planning a public work (*Johnson v. District of Columbia*, 118 U. S. 19), but in the ministerial function of carrying out that plan. 5 Thompson, Negligence, Sec. 5794. The only possible exemption applicable seems to be that taken in those cases which draw a distinction between the governmental and corporate functions of a municipality (*Moffitt v. Asheville*, 103 N. C. 237.) The typical case is that of nonfeasance in the face of a duty imposed upon the corporation, and it is upon this class of cases, which includes actions for injuries resulting from the negligent failure to repair highways, that there is the greatest conflict of authority. The leading cases denying liability upon this are *Hill v. Boston*, 122 Mass. 344, and *Detroit v. Blackeby*, 21 Mich. 84. Opposed to these are the cases represented by *Barnes v. District of Columbia*, 91 U. S. 540, repeatedly followed (*District of Columbia v. Woodbury*, 136 U. S. 450) and cited with approval even when subsequent decisions have been controlled by local or admiralty law. *Detroit v. Osborne*, 135 U. S. 492; *Workman v. New York City*, 179 U. S. 552, 574.

We need not enter into a discussion of these authorities, however, nor even into those holding that the repair of highways is properly classed as a corporate and not a governmental function (*Coburn v. San Mateo County*, 75 Fed. 520; *Barree v. City of Cape Girardeau*, 197 Mo. 382; 95 S. W. 330), because we are of the opinion that under no proper conception of the doctrine of municipal immunity in the performance of governmental functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff's private right as an adjacent land owner.

Matsumura v. County of Hawaii, 19 Haw. 18.

Before examining the authorities we may restate the question from a different point of view. It will be observed that the injury in any case may result from nonfeasance or misfeasance and that the latter class may be again divided so that we find injuries resulting from (1) nonfeasance, (2) the negligent performance of the act, (3) the necessary consequence of the act and (4) intentional trespass. Each of these four may in turn result in the invasion of (a) public or (b) private rights. When we take into consideration the fact that almost every case of negligence may be viewed indifferently either as omission or as commission (1 Street, Foundations Legal Liability, 86,) it is not strange that there is confusion in the application of the theory of governmental immunity among these classes of cases.

We have already left the subject of nonfeasance resulting in the invasion of a public right as unnecessary to decide in this case. At the other extreme lies intentional trespass upon a private right for which the municipality is always held responsible (*Hawks v. Charlemont*, 107 Mass. 414; *City of Omaha v. Goft*, 60 Neb. 57; 82 N. W. 120) except in those cases which deny the existence of the relation of master and servant. *Manners v. Haverhill*, 135 Mass. 165. Such cases naturally find no difference in principle between nonfeasance and misfeasance. *Johnson v. City of Somerville* (Mass.) 81 N. E. 268. The matter of the relationship of master and servant in public corporations, while not arising upon the declaration in this case, is, however, another subject upon which there is considerable conflict. *Workman v. New York City*, 179 U. S. 552.

The case at bar is concerned only with the invasion of a private right through misfeasance of the defendant's agent, either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable.

It is true that the horse of a fire department trespassing on

Matsumura v. County of Hawaii, 19 Haw. 18.

the plaintiff's lawn has been held to be doing so in a governmental capacity (*Cunningham v. Seattle*, 40 Wash. 59; 82 Pac. 143), and that a city dump cart loaded with house ashes may run over pedestrians with impunity while one loaded with steam engine ashes might give a right of action (*Haley v. Boston*, 191 Mass. 291; 77 N. E. 888; 5 L. R. A. (N. S.) 1005), but these are merely the reductio ad absurdum of those cases which fail to observe limitations which have been frequently pointed out. 2 Dillon, Mun. Corp. 3d ed. Sec. 950. Even *Hill v. Boston*, 122 Mass. 344, 358, the leading case on this subject, cites authorities holding the municipality liable in cases like the present, saying:

"In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but is the doing of a wrongful act, causing a direct injury to the property of another, outside the limits of the public work."

This limitation was pointed out and applied by Chief Justice Shaw in an early case. Referring to the privilege extended to governmental work he says:

"But this presupposes that the public work thus authorized will be executed in a reasonably proper and skilful manner, with a just regard to the rights of private owners of estate. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and unskilful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." *Perry v. City of Worcester*, 6 Gray 544.

A leading case in New Hampshire, which classes the building of an unsafe town hall as a neglect to provide a safe place for holding the town meeting and consequently the mere omission of a public duty, nevertheless cites with approval a line of cases, including *Delmonico v. The Mayor, etc., of New York*, 1 Sandford 222, in which cities and towns have been held liable

Matsumura v. County of Hawaii, 19 Haw. 18.

for private injuries done by them in the execution of public work, and says:

“The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question, whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work.” *Eastman v. Meredith*, 36 N. H. 284, 295.

A recent case in the same state contains an admirable summary of the limitation of the doctrine of governmental immunity in those states which adhere to it. *Rhobidas v. City of Concord*, 70 N. H. 90; 47 At. 82. From the authorities there collected it appears that in those jurisdictions towns are not liable at common law (1) for the improper discharge of a purely governmental function (2) for neglect to perform duties imposed upon them without their consent and (3) for the acts of officers whose powers and duties are so fixed by the legislature that the town cannot control or direct their actions, but that they are liable (1) for negligent acts (even in the discharge of imposed duties) which interfere with the rights of others, provided such rights do not depend upon the imposed duty (2) for their acts concerning property not employed in a public use, and (3) where duties of a public nature are voluntarily assumed.

Matsumura v. County of Hawaii, 19 Haw. 18.

It will be observed that in none of these general statements is any distinction sought to be taken between injury resulting from the necessary consequences of the negligent act and that resulting from the negligent manner in which the act was performed. No difference in principle between these cases is apparent, nor is any recognized by the authorities. *Ashley v. City of Port Huron*, 35 Mich. 296, in which the injury was the necessary result of the work, cites as "an action like the one at bar" *Nevins v. City of Peoria*, 41 Ill. 502, in which plaintiff's claim was "that the work undertaken by the city was badly and carelessly done and never completed, and that, in consequence thereof, his house and grounds were flooded at every considerable rain" and *Alton v. Hope*, 68 Ill. 167, in which a gutter was negligently allowed to get out of repair. In *Wallace v. City of Muscatine*, 4 Greene (Ia.) 276, a declaration alleging "improper and unskilful construction of certain culverts, drains and gutters made by the city, by which the water was turned and flowed upon the plaintiff's premises," was held to state a cause of action. Other courts have held municipalities liable for injury to plaintiff's land resulting from negligence in the construction of a bridge which turned the current (*Stone v. Augusta*, 46 Me. 127) or in the construction of one which proved insufficient to allow freshet water to pass through (*Allentown v. Kramer*, 73 Pa. St. 406), or in the construction of a culvert with the same defect (*Rochester White Lead Company v. City of Rochester*, 3 N. Y. 463), or in digging a ditch which let water on plaintiff's land (*Kobs v. City of Minneapolis*, 22 Minn. 159), all without alluding to any possible distinction as to whether the negligence was in doing the work or in the manner of doing it. Of the many cases of negligence resulting in turning surface water on plaintiff's land we may cite *Inman v. Tripp*, 11 R. I. 520; *Gilman v. Laconia*, 55 N. H. 130, and *Town of Princeton v. Gieske*, 93 Ind. 102. Injury by the dumping of dirt stands on the same footing. *Hendershott v. City of Ottumwa*, 46 Ia. 658.

Matsumura v. County of Hawaii, 19 Haw. 18.

If, then, a municipal corporation would be liable in this action, is there any authority for the exemption of the County of Hawaii, which has been expressly created a corporation empowered to sue and be sued (S. L. 1905, Act 39, Ch. 4, Sec. 9), upon the ground that it is a county?

The foundation of the immunity of counties from liability for torts is the case of *Russell et al. v. The Men Dwelling in the County of Devon*, 2 Term Rep. 667, but the question in that case as put by Lord Kenyon, was "whether this body of men who are sued in the present action, are a corporation, or qua a corporation, against whom such action can be maintained," and the decision is based on the lack of corporate capacity of the defendants and the inexpediency if not the impossibility of holding the inhabitants at large responsible for the tort. It is difficult in reading the opinions in that case to escape the conclusion that if the suit had been against a county expressly created a corporation with power to sue and be sued the result would have been different. As Baron Pollock said in a subsequent case: "We think it clear, after a full consideration of the case, that the only reason why an action would not lie was, because the inhabitants of the county were not a corporation and could not be sued, a difficulty that was got rid of by the statutes of Hue and Cry, and other statutes giving a specific remedy against the hundred." *Makinnon v. Penson*, 8 Exch. 319; 18 Eng. Law & Eq. Rep. 509. Nevertheless the case of *Russell v. Men of Devon*, as it is usually cited, has become authority for the proposition that "at common law a county could not be sued," (*Lyell v. Board of Supervisors of St. Clair County*, 3 McLean, 580) and was soon applied indifferently whether the defendant county was a corporation or not.

This doctrine, so far from resting on "historical" grounds, is the result of the gradual growth of error, which can be easily traced in the earlier American cases.

Matsumura v. County of Hawaii, 19 Haw. 18.

In *Mower v. The Inhabitants of Leicester*, 9 Mass. 247 (1812), the action was against a corporate town yet the court holds briefly that *Russell v. Men of Devon* is conclusive against the action. Rand's editorial note in the 1850 edition of reports points out that *Russell v. Men of Devon* leads in fact to the opposite conclusion. In *Freeholders of Sussex v. Strader*, 15 N. J. L. 108 (1840) in which the board of freeholders was a corporation, the reference to the lack of corporate capacity in *Russell v. Men of Devon* is said to be "by way of argument" and is therefore disregarded. These two cases are plainly erroneous in their application of the English decision, and are probably among the decisions disapproved in *Weightman v. The Corporation of Washington*, 1 Black 39, 53, as based upon a misapplication of that case, yet scarcely a case can be found exempting a county from liability which does not have its roots in these cases.

Most of the confusion, however, has arisen from the use of the term "quasi corporation" in the early case of *Riddle v. Proprietors of Locks*, 7 Mass. 169 (1810). In this case the defendant, being a corporation, was held liable, and *Russell v. Men of Devon* is cited and distinguished in the following language:

"We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called quasi corporations. Of this description are counties and hundreds, in England; and counties, towns, &c., in this state. Although quasi corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law; yet it is settled in the case of *Russell & Al. vs. Inhabitants of the County of Devon*, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose, but in cases where the statute is

Matsumura v. County of Hawaii, 19 Haw. 18.

an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply."

It is doubtful if the term "quasi corporations" was here used with any other meaning than bodies which resemble corporations but which are not so in fact as contrasted with "regular" corporations. Owing, however, to the reference to "particular" powers and "without their consent" this dictum has become standard authority for the proposition that corporations expressly created as such are immune from liability for torts if they were created involuntarily, and especially if their powers are "particular" in the sense of limited in number. Thus in *Mower v. Leicester* a quasi corporation becomes one "created by the legislature for the purposes of public policy." In *Morey v. Town of Newfane*, 8 Barb. 645 (N. Y. 1850), a quasi corporation is one of "those minor political organizations whose corporate powers and functions are conferred without their solicitation for the benefit not of themselves but of the public at large," and *Riddle v. Proprietors of Locks* is cited as authority that quasi corporations are not liable for tort at common law.

Still later the impropriety of calling a complete though involuntary corporation a "quasi corporation" became so manifest that the phrase becomes "quasi-municipal corporations" (20 Enc. Law 1191 n. 3) so that the student may infer that "quasi" modifies "municipal" and not "corporation," and from this it is an easy transition to "quasi municipalities." *Alberts v. Muskegon*, 146 Mich. 210, 213.

Finally, the "particular powers" which obviously refers to those in the nature of corporate powers, is construed to refer to the power in connection with which the tort occurred, so that *Riddle v. Proprietors of Locks* becomes authority for the nonliability not only of municipalities whose corporate capacity was involuntary but also those voluntary corporations which have a general duty (e. g. keeping highways in repair) invol-

Matsumura v. County of Hawaii, 19 Haw. 18.

untarily imposed upon them. *Bigelow v. Randolph*, 14 Gray 541.

Another prolific source of misunderstanding is Lord Kenyon's remark in *Russell v. Men of Devon* "that where an action is brought against a corporation for damages those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation there is no corporation fund out of which satisfaction is to be made." This last phrase, taken from its context, has been made the basis of a line of reasoning entirely foreign to its original meaning.

See for example *Hedges v. County of Madison*, 6 Ill. 567 (1844) which says: "All these cases assume the ground that there is no corporate fund provided for this purpose and the same is applicable in the present case, for although each county is enabled to provide a fund for public purposes this fund cannot be diverted from their objects and appropriated to private indemnification without express provision of law for that purpose." In *Freeholders of Sussex v. Strader*, the court is "not sure that there is any corporate fund out of which the board of freeholders could rightfully pay these damages if any be recovered." In *Commissioners of Hamilton County v. Mighels*, 7 Oh. St. 110 (1857) the argument of lack of corporate fund "applies with great weight to the case at hand though it is true that counties in Ohio have a treasury and in it various funds."

To add still further to the confusion, cases which perceived even dimly that *Russell v. Men of Devon* was not satisfactory authority for holding a *corporate* county exempt from liability began to invent new reasons for exempting counties. This had to be done with care, because in many cases it was recognized that municipal corporations proper would be held liable on the same state of facts. In *Morey v. Town of Newfane*, 8 Barb. 645, lack of corporate capacity is recognized as the ground of the decision in *Russell v. Men of Devon*, and the court, looking

Matsumura v. County of Hawaii, 19 Haw. 18.

for other reasons, finds them in the case in Brooke's Abridgment, therein referred to, as founded upon a different consideration, namely, that "it is a public matter." This overlooks the reason for the case as stated in *Russell v. Men of Devon*, namely, "because the action must be brought against the public," (misquoted in *Weet v. Brockport*, 16 N. Y. 161, 167, as "the action must be brought by the public"), and starts a new series of cases which defends nonliability of counties on the ground of public policy, finally blossoming into the theory that counties are governmental agencies sharing the sovereign immunity of the state from suit (*Board, etc., of Jasper County v. Allman*, 142 Ind. 573), a doctrine about as far removed from the decision in *Russell v. Men of Devon* as it is possible to conceive. The case of *Commissioners of Hamilton County v. Mighels*, 7 Oh. St. 110, draws the distinction as follows:

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

With cases holding counties immune because their powers are so limited that they can scarcely be called corporations at all, and others reaching the same result because their powers partake of the sovereign character of the states, it is not surprising to find the whole distinction between counties and cities repeatedly criticized and disapproved. In Thompson's later work he says: "The reason of the rule which, in many cases, charges a city, town or village with liability, and under the same condi-

Matsumura v. County of Hawaii, 19 Haw. 18.

tions of fact, exonerates a county, is artificial, and is to be sought for in historical sources: It is not supported by legal reason or analogy." 5 *Thomp. Com. on Neg. Sec.* 5822. Another writer says: "If it be granted that a public corporation, such as a city, is liable because it is charged with a public duty and invested with means to enable it to perform that duty, it is logically impossible, as it seems to us, for one who proceeds on principle to avoid the conclusion that a county charged with a specific duty and provided with the means of performing it is likewise liable * * *. Both are governmental corporations invested with authority from a distinct locality and what is the duty of one is in its essential nature the duty of the other, and if one is liable for a breach of duty, if we keep to principle we must affirm that so also is the other." *Elliott, Roads and Streets*, 2d Ed., Sec. 52. See also Secs. 439, 444 and 449.

Judge Dillon says: "It must be confessed that it is not easy to find solid legal grounds to sustain the distinction. To a limited extent the same view has been elsewhere taken. It must be confessed that it is not easy to find a legal basis for the distinction between cities and counties in respect of the duty to keep the streets and highways under their respective jurisdictions in repair, whereby the former are held to an implied civil liability for damages caused by the neglect of this duty, and the latter are held not to be thus liable." 2 *Dill. Mun. Corp.* (3d Ed.), Sec. 998.

In *Williams, Municipal Liability for Tort*, there is an attempt to find a satisfactory basis for the distinction in question which is thus stated:

"The immunity of a quasi corporation stands upon the ground, not that it is a governmental agency, but that its duty relative to highways is public and governmental; for though a governmental agency, it will be liable to a private action at common law at the suit of any person who may suffer special damage from the negligent performance of any duty that is not public and governmental in nature." *Williams, Mun. Liab. Tort*, Sec. 71.

Matsumura v. County of Hawaii, 19 Haw. 18.

This, however, brings us back from the character of the defendant to the nature of the tort, already discussed at length, and in the case at bar would put counties and municipal corporations on the same footing, for as the same author observes:

"The actual manual labor involved in grading and improving streets and highways is purely ministerial in character. It involves the exercise of no judgment or discretion on the part of the municipal authorities; it requires no deliberation for its accomplishment. When therefore the manual work of construction begins, the reason for the application of the usual rule of immunity ceases, and municipal corporations are held responsible in damages for the consequences of their negligence or lack of due skill in performing the actual work of grading and improving." Williams, Mun. Liab. Tort, Sec. 66.

Returning to Hawaii we find the question arising as one of first impression, as neither counties nor any other corporate subdivision of the Territory ever existed prior to the county act of 1905. Were there no judicial precedents contra to the line of cases above criticized (see for example *Anne Arundel County v. Duckett*, 20 Md. 468; 83 Am. Dec. 557), they would still be inapplicable to the newly created counties of Hawaii, which, except in name and corporate capacity, bear little resemblance to the counties of the various states, but whose powers, as defined by S. L. 1905, Act 39, are confined to the exercise of police powers and to the ministerial duties of conducting sewers, pumping stations, water works, lighting plants, fire departments, streets and highways. Whatever may be the authority for exempting counties on the theory that they are governmental agencies it cannot be applied to those that have no power to levy taxes, no county courts for the administration of justice, no control over matters of education, provision for the poor or military organization. They could as well be called "districts" as "counties," or, on the other hand, could be called "city and county," as has been subsequently done with the Island of Oahu, which has been converted from the "County

Matsumura v. County of Hawaii, 19 Haw. 18.

of Oahu" into the "City and County of Honolulu." S. L. 1907, Act 118. These differences make the extension of immunity to counties in Hawaii merely a blind adherence to nomenclature in the application of an erroneous principle. In *Eastman v. Clackamas County*, 32 Fed. 24, the court points out forcibly the misapplication of *Russell v. Men of Devon* and the fallacy of any distinction between corporate towns and corporate counties, saying:

"The reason given for this distinction—that the inhabitants of a town incorporated under a special statute consent thereto, while a county exists, without the consent of its inhabitants, simply as a subdivision of the state—shows that it is a distinction without any substantial difference.

"In 1 Thomp. Neg. (1st Ed.) 618, the author, after premising that the ground of the judgment in *Russell v. Devon Co.* is not sound when applied to counties in the western states, says:

" 'These counties are political bodies, having a common administrative board, elected by voters of the county, by which the business of the county is transacted. Through this board the county contracts and is contracted with, sues and is sued. Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county purposes. In these respects no substantial difference is perceived to exist between them and chartered municipal corporations. The argument that a liability should attach to the latter, and not to the former, because the latter are supposed to accept their charters voluntarily, while the duties and obligations annexed to the former are imposed on them involuntarily, is based on an assumption, in most cases, untrue in point of fact, and is, even where the premises are correct, fantastical and destitute of sense. There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the legislature, in the due exercise of its powers, has imposed upon it.' "

The theory that involuntary quasi corporations are not liable for negligence is referred to as "well settled" in *Barnes v. District of Columbia*, 91 U. S. 540, 552, but the court was there

Matsumura v. County of Hawaii, 19 Haw. 18.

referring to responsibility for "mere negligence" or more specifically to the neglect to keep highways in repair. In *Weet v. Brockport*, 16 N. Y. 161, there cited, the distinction as to the nature of the tort was taken, and the trustees of a village held liable in their corporate capacity for misfeasance. That a corporation is not to be classed as a "quasi-corporation" merely because involuntary, is shown by *Barnes v. District of Columbia* itself, in which the district was held liable for the negligence of its officers, in spite of the fact that not only its corporate capacity but also the duty neglected and the negligent officers were all imposed on it without its consent.

There is no "lack of corporate fund" in the present case, as the county receives an income from the Territory to be appropriated for any legal object, nor is the modern misapplication of this phrase tenable under the decision in *District of Columbia v. Woodbury*, 136 U. S. 450, 456, in which the court says:

"It is suggested that the District is without the means to perform the supposed neglected duty; that none of its officers can pay a judgment against it, and that no process against it could enforce payment; that even a mandamus against it to levy a tax would be futile because neither the District nor the Commissioners can levy a tax for any purpose; and that no judgment against it can be paid except by warrant upon the Treasury, pursuant to an appropriation by Congress. We do not perceive that these considerations materially affect the principle upon which the decision in the *Barnes Case* rests."

For these reasons we are of the opinion that the declaration states a cause of action against the defendant in this case.

The exceptions are sustained.

Carl S. Smith and *Albert F. Judd* for plaintiff.

William L. Whitney, Deputy Attorney General, (*C. R. Hemenway*, Attorney General, with him on the brief) for defendant.

Matsumura v. County of Hawaii, 19 Haw. 18.

DISSENTING OPINION OF WILDER, J.

Assuming, what is perhaps not technically averred, that the negligent act complained of was done in the course of maintaining and constructing the road, the question is whether the declaration sets forth a cause of action.

In the absence of statute, as a general rule, which is conceded by both plaintiff and defendant, counties as distinguished from what are called full municipal corporations, such as cities, are not liable in actions of this kind, the divergence of opinion being whether this defendant is within that rule. Counties are created for public purposes without regard to the actual wishes of their inhabitants and are in substance but agencies of the government for the purpose of aiding in the general administration thereof. The clothing of them with a corporate form is only done so that they may better perform their duties. They usually comprise large areas of territory which are not thickly settled and in which the relations of life and business are comparatively simple. On the other hand, municipal corporations proper are generally incorporated at the request or at least with the assent of their inhabitants by special charters or voluntarily organized under general laws. They have a greater variety of powers and duties, are usually confined within smaller and more compact limits, are more thickly settled, and the relations of life and business in them are more complex. Because of the difference in the nature of the two organizations it has been generally held that, as the functions of the one are in the main governmental and of the other corporate, an action of tort for negligence lies against a city but not against a county. This distinction, which seems to be upheld by reason of public policy, when viewed from the standpoint of reason, does not appear to be sound. Cities as much as counties are auxiliaries of the general government in the business of internal administration. In both cases their rights, privileges and functions are under the control of the legislature and by that body subject to be

Matsumura v. County of Hawaii, 19 Haw. 18.

changed, modified or repealed as the public welfare may be supposed to require, and neither one can justify its existence or any rights or privileges conferred upon it by anything like a contract. However that may be, the distinction is well established. *Coffield v. Territory*, 13 Haw. 478, 480. I prefer, however, not to rest the question of liability or nonliability in this case upon whether the defendant is within or without that rule, but upon the broad ground that the function of maintaining public highways, in the performance of which the alleged injury occurred, is a governmental one in this jurisdiction, with the necessary consequence that defendant is not liable.

Before the passage of the county act the maintenance and repair of public highways devolved upon the Territory. The Territory is not liable for injuries from defective streets. *Coffield v. Territory*, 13 Haw. 478. At that time road boards throughout the Territory and a road supervisor in the district of Kona on the Island of Oahu had charge of the work of repairing and maintaining public highways in their respective districts subject to more or less supervision by the superintendent of public works. R. L., Ch. 39, 48, 50. These road boards were required to expend the road taxes, which were a special deposit in the treasury, and moneys appropriated by the legislature, in making and repairing roads and bridges. They were agents of the general government discharging public duties for the public benefit. *Dillingham v. Hawaiian Government*, 9 Haw. 101, 106. Since the passage of the county act it has been provided that the road taxes, which are still a special deposit, "shall be expended in the making, maintaining and repairing of the public roads and highways in the several road districts wherein the same are collected and shall not be expended in any other district" or for any other purpose. Laws of 1905, Act 89, Sec. 5. The supervisors of each county have now the functions and authority of the different road boards and road supervisor, and it is provided that the "road taxes shall be expended only

Matsumura v. County of Hawaii, 19 Haw. 18.

for the making, maintaining and repairing of public roads and highways in the several road districts as authorized by the supervisors of the county from time to time," and these moneys may not be used for any other purpose. Laws of 1905, Act 93, Sec. 3. The function of repairing and maintaining public highways by the Territory is undoubtedly a governmental or public one. That the legislature has conferred on the counties the power to do the same thing does not change the nature of the function itself, which I think is the same now as before, namely, governmental. By the performance of this work counties receive no special benefit or profit any more than the Territory did formerly. Probably it is true that the residents of a county use its highways more frequently than residents of other parts of the Territory and in that sense may reap a greater benefit from them. But this is more emphatically true in respect, for instance, of policemen and firemen, for whose negligent acts counties would not be liable.

In Arkansas, California, Connecticut, Indian Territory, Massachusetts, Michigan, New Jersey, South Carolina and Vermont the duty of repairing and maintaining public highways is regarded as a governmental one, and in the absence of statute a municipality is not liable for negligence in respect thereto. *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32; 4 S. W. 450; *Winbigler v. Los Angeles*, 45 Cal. 36; *Hewison v. New Haven*, 37 Conn. 475; *Blaylock v. Muskogee*, 117 Fed. 125; *Hill v. Boston*, 122 Mass. 344; *Detroit v. Blackeby*, 21 Mich. 84; *Pray v. Jersey City*, 32 N. J. L. 394; *Young v. Charleston*, 20 S. C. 116; 47 Am. Rep. 827; *Bates v. Rutland*, 62 Vt. 178.

In the absence of statute a municipality is not liable for negligent acts of its policemen, firemen, health, school and charity officials. This is on the theory that the duties performed by these persons are governmental. Yet they are no more governmental than in the case of highways in this Territory.

Matsumura v. County of Hawaii, 19 Haw. 18.

Plaintiff, however, contends and the majority of the court agree with him that even if defendant is not liable for failing to keep public highways in repair it should be held liable for negligence in repairing, that is, that there is a liability in case of a misfeasance even if otherwise as to a nonfeasance. This distinction is referred to in some of the cases but on principle it does not appear to be sound because the function of repairing highways is governmental whether there is a failure to repair or a negligent repairing. In the late and well considered case of *Johnson v. Somerville*, 81 N. E. (Mass.) 268, it was held that no distinction can be made between negligent and intentional acts." See also *Alberts v. Muskegon*, 146 Mich. 210, and *Young v. Charleston*, 20 S. C. 116; 47 Am. Rep. 827.

In the case of *Johnson v. Somerville* plaintiff claimed damages by reason of the flooding of his cellar which was caused by an employee of defendant city in dumping ashes into a water-course on an adjoining piece of land. The court said:

"If the plaintiff had been run over and injured through the negligence of a driver of one of the defendant's carts, while it was being used in the removal of the ashes here in question, he could not have recovered damages for the injury from the defendant city. That is established by the recent case of *Haley v. Boston*, 191 Mass. 291. The ground on which it is contended that the city is liable here is that the rule applied in *Haley v. Boston* is confined to cases of negligence and does not apply to injuries caused by intentional acts; that is to say, by acts which, if done on the plaintiff's land in place of being done on land not owned by the plaintiff, would be ground for an action of trespass quare clausum fregit, as distinguished from an action on the case. In the opinion of a majority of the court no distinction can be made between negligent and intentional acts."

Alberts v. Muskegon, 146 Mich. 210, is diametrically opposed to the conclusion of the majority in the case at bar. There plaintiff was the owner of a barn abutting on a certain avenue in defendant city, on which avenue defendant was operating a steam roller. Through the negligent action of defendant sparks

Matsumura v. County of Hawaii, 19 Haw. 18.

from the steam roller set fire to the barn and burned it up. The court held that the city was not liable. As it well said:

“The case at bar is not one of damages resulting from a direct trespass or from misfeasance of the city amounting to a trespass. It is a case of consequential injury resulting directly from the negligent conduct of the defendant’s agents.”

There, as here, the injury occurred to property outside the limits of the highway. There, as here, the injury would not have occurred but for the negligence of defendant. There, as here, the damages did not result from an act of the defendant amounting to a trespass.

Without discussing the cases cited by the majority to the effect that upon the facts alleged here an action lies against a municipal corporation in the absence of statute, it is sufficient to say that most of them are from states in which it is held that in the absence of statute an action lies against a municipal corporation for a failure to repair a highway, and naturally those courts hold that there is a right of action in a case like the one at bar. As to the cases cited by the majority from Massachusetts and Michigan and from other states which follow the rule of liability adopted there in case of a failure to repair, they, in so far as contrary to my conclusion, are in effect overruled and disposed of by the later cases to which I have referred.

I think that if the legislature had intended that counties should be liable in actions of this kind it would have expressed such intention in plain terms.

Plaintiff’s claim that his property was taken in violation of the fifth amendment to the constitution is without merit.

For the foregoing reasons it is my opinion that the exceptions should be overruled.

Territory v. Brown, 19 Haw. 41.

THE TERRITORY OF HAWAII, BY C. S. HOLLOWAY,
SUPERINTENDENT OF PUBLIC WORKS, v.
CECIL BROWN, EXECUTOR, AND ABIGAIL
CAMPBELL PARKER, EXECUTRIX, OF THE
LAST WILL AND TESTAMENT OF JAMES CAMP-
BELL, DECEASED.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED MARCH 9, 16, 1908.

DECIDED APRIL 30, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CONTRACTS—*agreement to pay sewer rates.*

An agreement with the superintendent of public works "to pay such rates annually for the use of the sewer as may be fixed" is enforceable.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an action brought in December 1906 to recover the sum of \$133.50 and interest from June 30, 1904, for sewer rates from December 31, 1902, charged to the James Campbell Estate for use of the public sewer on Queen street, Honolulu, in connection with the Campbell block. The complaint avers that on March 2, 1901, the defendant Brown, executor of Campbell's will, in order to obtain the use of the public sewer for the property, applied to McCandless, predecessor of Holloway, superintendent of public works, for permission, which was given, to connect it with the sewer, agreeing to pay such rate annually for use of the sewer as might be fixed and that it was fixed at \$89 annually for the Campbell block. The application is signed "Cecil Brown, executor last will, etc., James Campbell," the applicant agreeing to conform to rules of the board of health relating to plumbing and sewer connection, to obtain the permission of the road supervisor to tear up the streets if necessary in order to make the connection with the

、 Territory v. Brown, 19 Haw. 41.

sewer main and then to place the road in a good safe condition, "and to pay such rates annually for the use of the sewer as may be fixed." The defendants demurred to the complaint on the grounds that it did not show authority of the plaintiff or his predecessor to assess the rates, or his legal capacity to sue; that the court had no jurisdiction of the subject matter, and that the complaint did not state a cause of action. The demurrer was sustained January 20, 1908.

The defendants do not object to the action on the grounds that it is brought by the superintendent of public works in the name of the Territory rather than by the attorney general under Sec. 2009 R. L., or that, after the executors had been discharged (18 Haw. 234), it was brought against two of them for breach of an agreement made by one executor, or that it was brought by the successor of the superintendent with whom the agreement was made and continued in his name after he in turn was succeeded by a new incumbent.

The claim of nonliability is based on the absence of statutory power in the superintendent to assess or to require payment of the rates. The defendants contend that "municipal authorities cannot levy an assessment for an improvement without express legislative permission," 2 Smith, Mun. Corp. Sec. 1229; that exercise of the taxing power is legislative, Judson, Taxation, 364; that power to tax is not usually implied "from legislative authority permitting certain improvements to be made," 2 Dillon, Mun. Corp. 3 Ed. Sec. 764; that when authority is given by a municipal charter to improve sidewalks, the means being provided by an annual tax, special assessments are not necessary to execute the grant of power and therefore are not "allowable to be exercised by implication or otherwise in the absence of any express authority in the charter," *Fairfield v. Ratcliff*, 20 Ia. 396; that authority to require property to bear the expense of local improvements is included in the taxing power and that it is generally considered to be a question of legislative

Territory v. Brown, 19 Haw. 41.

expediency whether the expense shall be paid out of the general treasury or assessed upon the property specially benefited. Judson, *supra*, Sec. 367; Dillon, *supra*, Sec. 752.

The case is not within the rule applicable to unauthorized assessments made upon owners or occupants of property abutting upon streets in order to obtain funds for defraying the expense of public improvements which benefit the property. The defendants' request for permission to connect the property with the sewer and their promise to pay for use of the sewer are not shown to have been required by any rule or regulation of the superintendent of public works or of the board of health. It was a voluntary offer which presents the question whether, after its acceptance and the subsequent use of the sewer, the defendants can avoid the contract so made on the ground that it was illegal either as contrary to public policy or because it was *ultra vires*.

By Act 6 of April 14, 1904 (Ch. 84 R. L.), the superintendent is required to direct and superintend the connecting of premises with the public sewer, charges for use of the sewer to be fixed from time to time by him subject to the approval of the governor, to be "reasonably approximate to the cost of work done and material used," and "as nearly as reasonably may be, so that the entire yearly receipts for sewer use shall not exceed the total yearly interest on the bonds representing the cost of the sewer system." It is not averred, and cannot be inferred, that the rates charged to the defendants were such as had been fixed under the act, but it may be inferred that they were fixed by the superintendent, in the absence of statutory authority. If the agreement contemplated payment of rates which the superintendent should fix when authorized by statute to do so no right would be impaired by charging rates when so fixed, but there is nothing in the agreement on which to base an inference that it was made in reference to anticipated legislative action. Either the agreement is too uncertain to be a contract in its

Territory v. Brown, 19 Haw. 41.

failure to express an essential term, or else it may be taken to mean that the rates were to be fixed by the superintendent.

The agreement has an illusory appearance. A promise that for certain services such remuneration be made as shall be deemed right gives no right of action to the person who performed the services, *Taylor v. Brewer*, 1 M. & S. 290, an action by a bankrupt's assignees to recover compensation for work done by the bankrupt. Ellenborough, C. J., regarded this "an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted and the same thing does not unfrequently happen in contracts with several of the departments of government;" Grose, J., said the defendants "were to judge whether any or what recompense was right;" Le Blanc, J., "It seems to me to be merely an engagement of honor;" Bailey, J., "It was to be in the breast of the committee (defendants) whether he was to have anything and, if anything, how much." In *Bryant v. Flight*, 5 M. & W. 514, plaintiff performed services on an agreement that "the amount of payment I am to receive I leave entirely for you to determine." A majority of the court thought that the agreement implied that some amount was to be paid and that "the jury were to ascertain how much the defendant, acting bona fide, would, or ought, to have awarded;" Parke, B., considered it "a mere honorary obligation on the part of the defendant."

"The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties; and 'I leave it to you' may well mean in particular circumstances (as in various small matters it notoriously does), 'I expect what is reasonable and usual, and I leave it to you to find out what that is,' or, 'I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man.'" Pollock, *Contracts*, 45.

Territory v. Brown, 19 Haw. 41.

If the defendants' promise was to pay for the use of the sewer whatever the superintendent should consider the service to be reasonably worth there would be a right of action to recover the reasonable value of the service unless the agreement was illegal or the defendants were estopped from disputing its legality, but we think the promise means that the defendants were to pay the rates which the superintendent should fix. Although the superintendent had no express statutory authority to require payment for the use of the sewer yet in the opinion of a majority of the court his acceptance of a promise to pay for its use was within the general scope of his duties in the "general supervision, charge and control" over public highways (Sec. 594 R. L.) and "superintendence and management of the internal improvements of the Territory" (Sec. 489 R. L.), when taken in connection with the authority of the acts appropriating money for the construction of the sewer under his direction. In this view the agreement was not illegal.

There is a distinction in legal effect between agreements with public officers which are illegal because *ultra vires* and those which are illegal because contrary to positive law, to morality or to public policy. Pollock, *supra*, 234. If this was an illegal agreement it was because of its tendency "to interfere with the internal administration of the government" (Harriman, *Contracts*, Sec. 175,) by introducing "mercenary considerations to control the conduct of a private individual (public official) in a case where such conduct ought to be influenced only by a regard for the public welfare." Harriman, *supra*, Sec. 181.

Many agreements, even if made without authority of law, clearly conduce to public welfare. It is for the public interest that streets be cleared of garbage and sprinkled with water and public sewers used. Upon failure or in the absence of appropriations for these objects owners of property abutting upon the streets and the public generally are benefited by their accomplishment by means of voluntary contributions and there can

Territory v. Brown, 19 Haw. 41.

be no objection to such contributions if made without promise by the superintendent to ask for their reimbursement from the legislature. If there is no reason of public policy against voluntary contributions to enable the government, when money provided by the legislature is not available, to keep the streets in sanitary condition, there can be no objection on that ground to agreements to pay money for the purpose or that the agreements should leave to the superintendent, who has charge of the streets, to ascertain how much is required, assuming that he would act honestly and impartially in apportioning it among the property owners who desire to contribute. To hold that such agreements are illegal because the law does not authorize them and therefore that they can be repudiated by those who made them, after receipt of benefits from expenditures made in reliance upon their agreements, does not accord with popular notions of justice or right, and in our opinion is not required by law.

The agreement is enforceable by the superintendent and therefore there is no occasion to consider the rule which, under certain limitations, estops one who has accepted the benefit of an agreement from pleading its illegality. This ruling allows the plaintiff to declare, as it has done, upon the agreement, and does not require a claim to be made for a reasonable sum in return for the use of the sewer.

Demurrer overruled, case remanded.

W. L. Whitney, Deputy Attorney General (*C. R. Hemenway*, Attorney General, with him on the brief), for plaintiff.

C. F. Clemons (*Thompson & Clemons* on the brief) for defendant.

MAY, 1908.

47

In re Lewers & Cooke, 19 Haw. 47.

IN THE MATTER OF THE PETITION OF
LEWERS & COOKE, LTD.

PETITION FOR REHEARING.

ARGUED APRIL 20, 1908.

DECIDED MAY 4, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

APPEAL AND ERROR—*petition for rehearing denied.*

The petition for rehearing in the case of *In re Lewers & Cooke, Ltd.*, 18 Haw. 625, is denied, the petition disclosing no substantial grounds within the rule and oral argument not leading the court to modify its previous conclusions.

OPINION OF THE COURT BY BALLOU, J.

The petitioner's petition for a rehearing of the decision in this case (*In re Lewers & Cooke, Ltd.*, 18 Haw. 625), contained the usual averments that the decision was in conflict with an express statute and with controlling decisions and that questions decisive of the case and duly submitted were overlooked by the court, but upon oral argument upon the petition the argument was devoted almost wholly to a restatement and reargument of the case in general. A case thus presented is naturally stronger than when counsel have not the advantage of an opinion of the court as a basis for argument, but aside from the lack of any substantial showing bringing the case within the usual rule for rehearing (*Ung Wo Sang Co. v. Alo*, 7 Haw. 306), we have not been led to any change in the conclusions arrived at upon the previous hearing.

The petition alleges that the previous decision is in conflict with an express statute, viz., R. L. Sec. 2407 as amended by Act 43 S. L. 1907. This statute provides that appeals from the court of land registration solely upon points of law may be taken to the supreme court, and upon issues of fact to the circuit court sitting with a jury. The alleged conflict is summarized in the

In re Lewers & Cooke, 19 Haw. 47.

allegation that "the attitude of the court is colored all through with the unconscious impression that the supreme court was deciding the case on the facts." As there has been no reversal of any findings of fact of the court of land registration and counsel upon argument could specify none, the point warrants no further notice.

The controlling decisions which it is alleged were not brought to the attention of the court through neglect or inadvertence of counsel are for the most part the long line of Hawaiian decisions cited in the previous briefs and commented on at length in the decision. Besides these some cases from the Supreme Court of the United States were cited where the judgments of a land commission sitting in California to decide claims under Mexican land grants had been attacked in equity. It is sufficient to contrast the statutory enactments regarding the Hawaiian land commission (R. L. pp. 1160, 1164), with the statute relied upon in the leading case cited to the effect that "the final decrees rendered by the commissioners or by the District or Supreme Court of the United States or any patent to be issued under the act shall be conclusive between the United States and the said claimants only and shall not affect the interests of third persons. 9 Stat. at Large, 634;" *Meader v. Norton*, 11 Wall. 442, 457.

Other cases hold that a land patent from the executive department of the government or a right adjudicated by a local board of limited jurisdiction may be decreed in equity to be held in trust for the person beneficially entitled. *Johnson v. Towsley*, 13 Wall. 72; *Rector v. Gibbon*, 111 U. S. 276, but in these cases also the language of the statutes and the character of the board are essentially different, particularly in the absence of the direct appeal to the Supreme Court provided by the Hawaiian statute. In instances where the doctrine of these cases applies it makes no difference that the plaintiff has contested the case to the highest tribunal or officer having jurisdiction

In re Lewers & Cooke, 19 Haw. 47.

(*Rector v. Gibbon*, supra), yet it would hardly be contended that after an appeal from the Hawaiian land commission to the Supreme Court, a contestant could begin again in a court of equity.

There was also an attempt to distinguish the cases cited in *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, on the ground that in no case was a party allowed to take advantage of the neglect of his predecessor in title to obey the decree alleged to be erroneous. This distinction is nowhere recognized in terms, and outside of the question of its application to the case of minors whose guardian neglected to convey, it is not supported by the cases. In *Hamilton v. Houghton*, 2 Bligh 169, the appellant's ancestor, Sir John Stewart Hamilton, was in default in the nonpayment of money; in *Johnson v. Northy*, Finch Prec. in Chan. 134, the respondent's predecessor Lady Lovelace, was in default in the nonexecution of an absolute decree in a contested case. As to the American cases, we do not think that *Gay v. Parpart*, 106 U. S. 679, was decided on the narrow ground that the decree of partition failed to order a conveyance, and in *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, 561, no stress whatever is laid upon the incompleteness of the first decree, but it was assumed for the purposes of the decision that the defendant was bound and consequently in default.

It is contended that while the doctrine of "the law of the case" is not technically applicable to the case at bar owing to the difference in parties, yet the principle of stare decisis should be applied and this particular property should be treated as governed by the law of the decree of 1858 even though now thought to be erroneous. *Bibb v. Bibb*, 79 Ala. 437. The doctrine of stare decisis in this sense, however, is applied only when the rights of innocent purchasers for value have intervened as to the particular property, and the petitioner in this case, which is the only party claiming to have bought for value, bought

In re Lewers & Cooke, 19 Haw. 47.

pendente lite with the knowledge of appellant's pending action in ejectment and of the counter petition in equity admitting that the legal title was outstanding and praying for the enforcement of the old decree. It is in the same position as that of Windett in *Gay v. Parpart*, 106 U. S. 679, 696.

It is also urged that the petitioner had a right to rely upon the decision in *Kapiolani Est. v. Atcherley*, 14 Haw. 651. In that case, however, there was no decree or other formal action of the court fixing the rights of the parties. The decision was on demurrer which is by no means conclusive as predicting the final determination of the case after the defendant has answered and brought evidence to sustain its own version of the facts, together with such new points as could not be raised upon the face of the complaint. This is particularly true in a case in which the action of the court was apparently to be a matter of discretion. After that decision the defendants answered at length and the Kapiolani Estate, Ltd., did not press the case to trial but sold to the present petitioner with the case still pending. If the petitioner was entitled to rely on anything it would be only upon the general principles of law announced by the court in its decision, to be gathered by a comparison of the two concurring opinions. For certain reasons there stated, mainly involving practice in suits against minors, the court were of the opinion that the decree of 1858 should not be reopened for examination, apparently in the sense of a retrial of the cause upon the testimony of witnesses. The court in the present case upon a principle of law not there alluded to, namely, that the decree of 1858 was erroneous in a fundamental principle, reached the conclusion that that decree should not be enforced. We are still of the opinion, although the question appears to be somewhat academical, that that is not an overruling of the previous decision.

We are unable to find anything affecting the rights of the appellant in the circumstance that shortly after the decree of

In re Lewers & Cooke, 19 Haw. 47.

1858 Armstrong, who had been guardian of the minors, took a mortgage in his individual capacity from Kalakaua, reciting that the land in question had been "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court." Were the opinion of Armstrong on the effect of the decree in any way material we should draw the inference that he thought it was self executing, which might explain his neglect to make a conveyance.

We are also unable to find anything material in a stipulation in *Kapiolani Estate, Ltd., v. Atcherley*, alleged to have been accidentally omitted from the record in this case, whereby, after bill and answer, the answer was withdrawn and an amended bill filed subject to a general demurrer and appeal from a pro forma dismissal in order to effectuate "the desire of both counsel for plaintiff and defendant herein that the question of res judicata under the proceedings in equity set up in plaintiff's bill of complaint herein be first adjudicated and settled, thereby determining whether further litigation between the parties hereto is necessary or not." While we see nothing in the stipulation which would improve the position of the plaintiffs in that case or the present petitioner as its successor in title, we are of the opinion that the opinion and decision of the supreme court upon the appeal should not be controlled, limited or construed by any reference to a stipulation of parties concerning the purpose of the appeal.

The petition for rehearing is denied.

Lyle A. Dickey and *E. M. Watson* for Mary H. Atcherley.

D. L. Withington and *R. B. Anderson* for Lewers & Cooke, Ltd.

Queen's Hospital v. Cartwright, 19 Haw. 52.

THE QUEEN'S HOSPITAL, A CORPORATION, v.
BRUCE CARTWRIGHT, TRUSTEE UNDER THE
WILL OF EMMA KALELEONALANI, DECEASED,
LUCY PEABODY, GRACE KAHOALII, ST. AN-
DREW'S PRIORY, AND HENRY B. RESTARICK.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 15, 1908.

DECIDED MAY 8, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TRUST—termination of.

The will of Queen Emma, made October 21, 1884, appointing a trustee, bequeathed \$2100 in four life annuities directing their payment by the trustee in monthly payments, \$600 per annum to St. Andrew's Priory for maintenance of four yearly scholarships of \$150 each, and devised seven tracts of land to the trustee in trust to devote its rents, income and profits to payment of the annuities and scholarships, giving him power upon the death of all the annuitants to sell one or more pieces of land if the rest would in the opinion of the supreme court produce a yearly income sufficient for the scholarships, one-half of the proceeds going to the Queen's Hospital and the other one-half to be invested by the trustee who was to pay the income to Albert Kunuiakea for life and the principal, at his death, to his issue, dividing any surplus income equally between the hospital and Kunuiakea during his life and, upon his death, his lawful issue; the trustee being further empowered in his discretion, after the death of the life annuitants, to sell the remaining lands investing the proceeds and, after payment of the scholarships out of the income, dividing the surplus between the hospital and Kunuiakea for life and, upon his death, his lawful issue. Two of the life annuitants, whose annuities were \$600 and \$300 respectively, had died and also Kunuiakea without issue, leaving the hospital, which was the residuary legatee, the sole beneficiary, besides the other annuitants, of the trust property. The trustee has received \$35,785 for land taken by the United States government which had previously brought little or no revenue and about \$9000 in bonds and mortgages, proceeds of land taken for street widening, yielding an

Queen's Hospital v. Cartwright, 19 Haw. 52.

income of over \$406, the rest of the lands, valued at upwards of \$68,000, yielding an income of over \$5000 which is more likely to increase than decrease.

Held: The court will not, at suit of the hospital resisted by the annuitants, declare the trust to be terminated in respect of property not required for the remaining annuities nor direct the trustee to transfer to the hospital such portion of the trust property as is not so required.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff seeks a decree ordering the trustee to transfer to it such portion of certain money and other property held under the trusts of the will of Dowager Queen Emma Kaleleonalani for payment of certain annuities as is not required in order to produce sufficient income for the annuities now outstanding, two of the annuitants having died. By her will, executed October 21, 1884, Queen Emma appointed Alexander J. Cartwright her trustee, bequeathed, for their respective lives, to the defendant Lucy Peabody \$900 per annum, to the defendant Grace Kahoalii \$300 per annum, to Hikoni (w) and Mary Liwai, each now deceased, \$600 and \$300, respectively, per annum, directing "such annuities to be paid by my said trustee or his successors in regular monthly payments," and bequeathed to St. Andrew's Priory \$600 per annum to be applied towards the maintenance of four yearly scholarships of \$150 each, and devised seven parcels or tracts of land to Alexander J. Cartwright in trust "to devote the rents, income and profits thereof to the payment of the aforesaid annuities and scholarships." The will provides: "Upon the death of said annuitants then the trustee or his successor may sell any one or more of the aforesaid pieces of real estate free and discharged of any trust, provided the real estate remaining will, in the opinion of the supreme court, produce a yearly income sufficient to provide for the aforesaid scholarships, the proceeds derived from the sale of any land as aforesaid to be divided one-half to the

Queen's Hospital v. Cartwright, 19 Haw. 52.

Queen's Hospital," the remaining half to the trustee in trust "to invest the same and the income to pay to my cousin Albert K. Kunuiakea" and upon his death to pay the principal so invested to his lawful issue living at his decease, "any surplus rents, income or profit derived from said real estate, after the payment of said annuities and scholarships, to be divided as follows: One-half to the Queen's Hospital" and one-half to the trustee in trust to pay the same to the said Albert for life and upon his death to pay said surplus to his lawful issue then living. The will further provides: "After the death of all said annuitants, if for any reason it should be deemed advisable in the discretion of my said trustee to sell the remainder of said real estate hereinbefore charged with the payment of said scholarships, I hereby empower my said trustee or his successor with authority to sell said remaining land or lands free and discharged from any trust, and the proceeds thereof to invest in safe and sound property, holding said property charged with the same trust as aforesaid to pay over the income for the purpose of maintaining said scholarships, rendering the surplus income as aforesaid, one-half to the Queen's Hospital aforesaid, and one-half in trust for the said Albert K. Kunuiakea during his life, and upon his death to those who are the lawful issue of his body living at his decease." The residuary clause of the will, after giving to the hospital one-half of the residue of the estate and one-half to the trustee in trust to pay its income to Kunuiakea for life and at his death to convey the property to his issue, if any, provides as follows: "But if the said Albert K. Kunuiakea should die without leaving lawful issue living at his decease, then I give, devise and bequeath all the said half of said rest, residue and remainder of my said property and estate, and all the said property hereinbefore devised and bequeathed to the issue of said Albert K. Kunuiakea living at his decease, to the Queen's Hospital aforesaid."

Queen's Hospital v. Cartwright, 19 Haw. 52.

The bill avers that Kunuiakea has died without leaving lawful issue and that the trustee holds for the purposes of the trust the sum of \$35,785, proceeds of land condemned by the United States government for public purposes, which previously was productive of little or no revenue, and bonds and mortgages of the value of upwards of \$9,000 (shown by probate records in Queen Emma's estate to be proceeds of land taken for street widening), yielding an annual income of over \$460 and that the rest of the land held in trust and valued at upwards of \$68,000 yields an annual income of upwards of \$5000, which is more likely to increase than decrease.

The defendants' demurrer, on the ground that the trustee is required by the will to retain all of the trust property until the death of all the annuitants and cannot safely or prudently deliver over to the plaintiff any part of the corpus of the trust fund and that the defendants are entitled to insist that he retain it, was sustained and the plaintiff appealed.

The plaintiff submits that "it is clear from these provisions that if all the annuitants were dead and St. Andrew's Priory had ceased to exist, the Queen's Hospital, being the only remaining beneficiary, would be entitled to receive the whole corpus of the estate. The annuities and scholarships having lapsed the trust would have become a dry one and the statute of uses would apply," or else "the court would declare the trust terminated and order the trustee to convey." In support of the claim of "a portion of the corpus in view of the fact that two of the annuitants are alive and the Priory is also still in existence" it is argued that "the principle applicable to cases where the objects of the trust have ceased to exist is applicable pro tanto to a case in which the objects have been partly performed and there remains in the trustee a large fund greatly exceeding what is necessary to carry out the remaining purposes, and where the trust property consists of several distinct parcels;" in other words, "that this trust has, in effect, become

Queen's Hospital v. Cartwright, 19 Haw. 52.

partly dry, and that, therefore, the residuary devisee is entitled to receive the corpus over and above what is necessary to the performance of the active part of the trust," citing *Inches v. Hill*, 106 Mass. 575; *Sears v. Hardy*, 120 Mass. 524; *Turnage v. Greene*, 55 N. C. 63; *Harbin v. Masterman*, 1 Ch. (1896) 351; *Haw. T. & Invest. Co. v. Barton*, 16 Haw. 294, 301.

The contention of the defendants is that there is no express authority for the proposed action given by the will, nor is there any implied authority, the power to sell after the death of the annuitants showing that the testatrix did not wish this to be done before then although having in mind the inconvenience of keeping the whole estate in trust merely that the scholarships might be provided for; that equity has no power to modify or set aside the provisions of a trust and can only terminate it when all its purposes have been accomplished or, according to much authority, when all the beneficiaries desire its termination and no good reason appears to the contrary; that the testatrix had a legal and moral right to withhold the capital trust fund from the hospital until the death of the annuitants, and the court cannot say what reason she had for doing this entirely aside from protecting the annuitants, citing *Floyd v. Davis*, 98 Cal. 591, 600; *Young v. Snow*, 167 Mass. 287; *Claflin v. Claflin*, 149 Mass. 19; *Hawley v. James*, 5 Paige 318.

The plaintiff submits that there is an inconsistency between the provision for a sale upon the death of the annuitants of one or more pieces if what remains will in the opinion of the court produce income for the scholarships and for distribution of the proceeds and the provision for selling, after the death of the annuitants, the remainder of the land and reinvesting the proceeds. It was the intention, it is suggested, although not expressed, that the first provision should apply to a sale of portions of the trust property before the death of all the annuitants, hence the phrases "remainder of said real estate," and "remaining land or lands" in the second provision, and the

Queen's Hospital v. Cartwright, 19 Haw. 52.

requirement in the first provision for dividing the proceeds because all the lands or proceeds of sales thereof would no longer be required to produce sufficient income for the remaining annuities and the scholarships, while under the second provision the proceeds must be reinvested because it was contemplated that by the time all the annuitants had deceased the unsold lands would yield only the income required for the scholarships. The inconsistency, however, is not apparent between a sale and distribution of proceeds of land not required in order to secure the scholarships and a sale, if found by the trustee advisable, of the rest of the land also with directions to invest the proceeds in other property to be held upon the same trust for paying its income for the scholarships and dividing the surplus income between the hospital and Kunui-akea or his issue.

If it were not for the life annuities and scholarships remaining to be paid out of the income of the trust property the plaintiff would be its sole ultimate as well as present beneficiary and as such would be entitled to a conveyance of it by a termination by decree of a court of equity of the bare trust of merely collecting and paying over the income. It is against the policy of the law to allow the legal title to be held for no other purpose than as a medium for transferring to another all the incidents of ownership by means of what is termed a passive, dry, naked or bare trust. Something more is required of a trustee than merely to collect and pay over the income without discretion as to its application in order to prevent the merger of an equitable with a legal estate. This familiar doctrine is illustrated in the cases cited by the plaintiff, and to some extent in *Harris, Assignee, v. Judd, Administrator*, 3 Haw. 421.

Whether this doctrine which the plaintiff invokes would be applicable after the death of all the life annuitants or upon a release or satisfaction of the remaining life annuities, if the trustee should then decline to dispose of the trust property as

Queen's Hospital v. Cartwright, 19 Haw. 52.

authorized by the will to do, is a question not now presented and is not to be regarded as controlled by the conclusions reached in this case.

The American cases cited in support of the plaintiff's claim do not go as far as it asks the court to go in this case. For instance, in *Turnage v. Greene*, 55 N. C. 63, the fund which was ordered to be paid to a daughter of the testator was eventually to go directly and meanwhile the whole profits went to her. "In her, then, are united the present right to the whole profits and the absolute ultimate dominion which gives as perfect a property as is known to law." A similar case was presented in *Inches v. Hill*, 106 Mass. 575, and in *Sears v. Hardy*, 120 Mass. 524. But the same court dismissed bills to terminate a trust in two cases cited by the defendants in which the circumstances were somewhat similar to those of the present case. In the first, *Claflin v. Claflin*, 149 Mass. 19, the trust created by the will was to pay the proceeds of the sale of the residue of the testator's estate to his son, \$10,000 when twenty-one years of age, \$10,000 when twenty-five years of age and the balance at the age of thirty years. The court said: "The strict execution of the trust has not become impossible." In the second case, *Young v. Snow*, 167 Mass. 287, the testator had left the residue of his estate to trustees to be held by them for twenty years and then it was to go to his heirs at law, certain annuities meanwhile being required to be paid to his children from the income, surplus income to accumulate for ten years and then be paid to his heirs until the end of twenty years when all of it was to go to them. There was more than enough income for the annuities. The plaintiff, as assignee of one of the children of her share of the trust property, brought a bill to terminate the trust in respect of that share, the other children consenting, but the court said: "Whether the testator made these provisions for one purpose or another is immaterial, since he had the right to order as he did."

Queen's Hospital v. Cartwright, 19 Haw. 52.

The plaintiff does not controvert the defendants' contention that in the American cases cited, in which a trust was terminated or a resulting trust declared, there was no opposition to the jurisdiction being exercised by the court and that all the legal and equitable interests were held by the person in whose favor the decree was made, and that in cases in which opposition was made or when there were outstanding equitable interests the court declined jurisdiction, but it submits that the English practice, as shown in the *Harbin* case, allows exercise of jurisdiction in such matters. The attorneys for the St. Andrew's Priory appear to think that the question is whether the rule of that case shall prevail against American precedent.

At first glance *Harbin v. Masterman* appears to be on all fours with the plaintiff's case and in conflict with American decisions. But the facts in the two cases will be found upon examination to be so essentially dissimilar as to justify and, perhaps, require a different treatment in the English case than in the case at bar. There was a bequest to trustees of the residue of the testator's personal estate upon trust to permit the same to remain in its actual state of investment or to alter or vary the investments and to pay out of the annual income several annuities to certain persons, of whom at his death ten were living. The will required the trustees in every year to invest any surplus income of the trust moneys, whether it should arise from the determination of any annuity or otherwise, upon certain securities named, and, after the death of the survivor of the annuitants, to convert the trust funds and the accumulations into money and stand possessed thereof upon trust in favor of five charities. Directly after the death of the testator his executors instituted a suit for the administration of his estate. In this suit the estate was administered and considerable sums of money were from time to time paid into court and consols purchased therewith and carried over

Queen's Hospital v. Cartwright, 19 Haw. 52.

to separate accounts for payment of the annuities. In 1871 the Vice Chancellor held that the charities were entitled to all of the residuary pure personalty and to the accumulations during twenty-one years from the death of the testator, also that he could not, having regard to the frame of the will, then order a division of the fund, although the annuities were amply secured. He might have ordered a division, he said, if the residuary legatees had been individuals, but as they were charities he thought he ought not to stop the accumulations. In 1893, twenty-one years from the testator's death, the court held that the annuitants had no right to resort to the surplus income of any past or future year or to the accumulations for the purpose of making up any deficiency and that the five charities were entitled equally to all of the surplus income of the pure personalty and the accumulations thereof "*and to such part of the fund in court as represented the same respectively.*" This order was affirmed on appeal. In 1894, by consent of nine out of the ten annuitants, certain sums were carried over to their accounts and the provision thus made for their annuities was accepted by them in full satisfaction thereof, with the exception of the tenth annuitant, Mrs. Venables, who did not consent. Her annuity was £150 and the order directed that the sum carried to the credit of her account should be invested in £6000 2½% annuities, the dividends of which were to be paid to her during her life or until further order. She declined to accept this provision. The charities thereupon brought a petition for payment to them of the fund in court other than the sums set apart to answer the annuities. It was conceded that the charities were entitled to have paid out to them the portion of the fund which had arisen from the accumulations of income. The question, as put by the judge, was, "What are the rights of an annuitant?" He said that in the case of an annuity given by a will followed by a gift of residue the rights, as pointed out *In re Parry*, 42

Queen's Hospital v. Cartwright, 19 Haw. 52.

(l'h. 570, were "to have such a security as will make it practically certain that the annuities will be paid," and he thought that the same principle applied to Mrs. Venables as in the other class of cases entitling her "to have such portion of the corpus appropriated for payment of her annuity as would make it practically certain that the annuity would be paid by means of the income of that portion." The residuary legatees offered to leave in court a further sum of £2000, making in all £8000 for the account of this annuity. This was because the old consols had been taken up in 1888 and replaced by a new stock bearing a lower rate of interest. On appeal from the decision it was contended for the plaintiff that there was no authority to direct the distribution of the residue after setting aside enough to answer the annuities and that the court could not diminish the corpus of the security against the annuitant's objection. To this argument it was replied that ever since 1734 it had been uniform practice to give to residuary legatees what the testator intended them to have as soon as the annuities were released or sufficient provision for them had been made; that if this were not so "no part of a residue of £100,000 could be paid out to a residuary legatee if an annuitant of £100 a year object." The court dismissed the appeal holding that although according to the strict language of the will the annuity would not come to an end until Mrs. Venables' death, and upon the terms of the will there was no jurisdiction to order the residuary estate to be distributed until after her death, yet the meaning of a will which charges an estate with legacies of this kind and directs that upon the death of the survivor of the annuitants the residue was to be divided is that it is a gift of the residue, subject to the payment of the annuities, and, if ample provision is made for their payment, that it has been the practice to let the residuary legatees have what is theirs, subject to the payment of the annuities.

Queen's Hospital v. Cartwright, 19 Haw. 52.

The will of Queen Emma gives her trustee no power, except upon or after the death of the life annuitants, to change the investment of the lands devised to him in trust, which was not to pay annuities "out of" the income, with no disposition of surplus income, but to "devote all the income" to payment of the annuities and to paying the surplus to the hospital and Kunuiakea while living. The annuities are not charged upon the residue, but are payable from the income of lands set apart by the testatrix as suited for her objects. No funds are in court for its direction. With power to change the investment the trustee might invest in securities not fluctuating in value. Income from land is uncertain, but a court does not contemplate the possibility that principal and interest on national securities will not be paid. The consols in which £8000 were invested in the *Harbin* case insured payment of the annuity, especially if resort to the principal could be made, as suggested by the court, in case of a deficiency.

If the trustee could sell this land and should buy U. S. bonds with the proceeds—at present rates \$93,600 would buy two per cent. registered bonds yielding an income of \$1800, the amount of the outstanding annuities—the annuities would be fully secured. But this course would not only be of doubtful value to the hospital,—it would nullify the direction of the testatrix that the lands be held by the trustee.

In view of the facts we think that a decree such as was made in the *Harbin* case might, under like conditions, be made by any court of equity jurisdiction. That it was not a departure from practice appears in *Weatherall v. Thornburgh*, 8 Ch. D. 261, which, upon the doctrine of the American cases cited by the defendants, held that a person entitled to a trust fund, subject to payment of an annuity and legacies, was not entitled to it immediately upon a sufficient sum being reserved to provide for the payment since the testator's language did not permit this, and "he had a perfect right to do what his language shows he did, and he did that not merely for the purpose of

Queen's Hospital v. Cartwright, 19 Haw. 52.

postponing the enjoyment of the surplus by the residuary legatee but for the purpose of making an accumulation to provide a fund for the payment of certain legacies which he bequeathed out of the accumulations."

The following cases illustrate the rule. In a trust to pay over the residue of trust funds after expenditure of certain sums of money in establishing an observatory and public baths, erecting a group of bronze statuary and founding a school of mechanical arts although, after sale of the Lick House there were ample funds for all the purposes named, the residuary legatees could not be paid until all the other trusts were performed, since "the will of the trustor is its (the court's) will". (*Floyd v. Davis*, 98 Cal. 591, 601), but a trust to pay the rents, issues and profits to A for life and then to B for life may be terminated by consent of all who are beneficially interested, the trustee's interest in his compensation being "no reason for the continuance of the trust." *Eakle v. Ingram*, 142 Cal. 15.

The object of the trust created in this will is clear. The lands of the testatrix, situated in various parts of Oahu and Kauai, are devised as follows: Two tracts of land to Elizabeth Pratt, one to Mary Liwai, a house lot to Lucy Davis, two pieces of land and a house lot to Grace Kahoalii, two parcels and a house lot to Stella Keomailani, rights of residence to Hikoni (w) and to John and Loui Blossom, nine parcels of land, including the Nuuanu Valley residence and Waikiki residence, to the Queen's Hospital, five tracts of land to the trustee to pay the rents to Kunuiakea for life over to his lawful issue, with power in the trustee at the request of Kunuiakea to sell the same free from the trust holding the proceeds upon the same trust, seven tracts of land to the trustee to divide equally the income, after payment of the annuities and scholarships, between the hospital and Kunuiakea. Whether the income would exceed the annuities or not, it was not until

Queen's Hospital v. Cartwright, 19 Haw. 52.

the death of the life annuitants that any of these lands could be released from the trust, and then, as if at first tentatively, by setting apart such of them as in the opinion of the court would produce income enough for the scholarships, and presumably in case it should appear that the income was more than enough, by allowing the trustee to use his discretion in selling the reserved land, investing the proceeds and paying to the hospital and Kunuiakea the income not required for the scholarships.

Nothing has occurred which the testatrix would not reasonably have anticipated unless the compulsory taking of part of the lands which, without lessening previous revenues, has placed large sums of money in the trustee's hands. But the money must stand in place of the land, "subject to the same trust and to the same ultimate disposition." *Gibson v. Cooke*, 1 Met. 75; *Holland v. Cruft*, 3 Gray 180; *Hovey v. Dary*, 154 Mass. 12. She might have devised the lands to the hospital charged with payment of the life annuities and scholarships and of one-half of the surplus income to Kunuiakea for life, but she preferred, as she had a right to do, to accomplish her object through the medium of a trustee with full knowledge that each time an annuity should fall in the amount of the other annuities would be lessened and the surplus, now payable to the hospital, would be larger.

Decree appealed from affirmed.

A. G. M. Robertson (*Holmes & Stanley* with him on the brief) for plaintiff.

C. F. Clemons (*Thompson & Clemons* on the brief) for St. Andrew's Priory and Henry B. Restarick.

R. B. Anderson (*Kinney & Marx* on the brief) for the Trustee, Lucy Peabody and Grace Kahoalii.

CONCURRING OPINION OF WILDER, J.

I concur only in the conclusion of the court, but with considerable hesitation, however, for the reason that, while techni-

Queen's Hospital v. Cartwright, 19 Haw. 52.

cally it may be correct, practically the result is to tie up property worth over \$112,000 in order to produce an annual income of \$1800, which seems to be contrary to common sense.

JOHN F. COLBURN, TRUSTEE UNDER THE WILL OF ROBERT WILLIAM HOLT, DECEASED, v. GEORGE H. HOLT, EDWARD S. HOLT, MAY K. BROWN, HELEN A. CUSHINGHAM, INDIVIDUALLY, AND HELEN A. CUSHINGHAM, AS GUARDIAN OF THE PERSONS AND ESTATES OF VALENTINE O. HOLT, WATTIE E. HOLT, AMELIA A. HOLT, HELENE A. HOLT, AND IRENE HOLT, MINORS, AND HELEN A. CUSHINGHAM, AS ADMINISTRATRIX OF THE ESTATE OF JAMES R. HOLT, JR., DECEASED, ANNIE K. KENTWELL, FREDERICK E. STEERE, MAKAHA COFFEE COMPANY, LIMITED, A CORPORATION, HENRY HOLMES, TRUSTEE, AND HENRY HOLMES, INDIVIDUALLY.

APPEAL FROM DISTRICT MAGISTRATE, EWA, OAHU.

SUBMITTED MARCH 2, 1908.

DECIDED MAY 12, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

LANDLORD AND TENANT—*summary possession.*

An action of summary possession against a lessee cannot be brought by one owning an undivided two-thirds interest of the lessor without alleging at least that the lessee is not entitled to the other one-third.

PRACTICE—*appeal on points of law.*

On appeal from a district magistrate on the point of law that a demurrer was erroneously sustained the judgment will be affirmed if any one ground of demurrer, though not passed upon, was well taken.

Colburn v. Holt, 19 Haw. 65.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by plaintiff on points of law from a judgment against him in a summary possession action instituted in the district court of Ewa to forfeit a lease of certain lands in Waianae and to recover possession of said lands, the ground of forfeiture being a breach of covenant to pay the taxes. The lease was made on November 22, 1862, by W. A. Aldrich, executor of the will of R. W. Holt, to John D. Holt, for the life of the lessee. The complaint alleges that the taxes on an undivided two-thirds of the lands were assessed to C. A. Long, administrator de bonis non with the will annexed of the estate of R. W. Holt, that the defendants who are in possession of the lands and who hold the same by virtue of divers mesne conveyances from the lessee have not paid the taxes as agreed in the lease, and that plaintiff is entitled to an undivided two-thirds interest of the lessor in the lands. The demurrers to the complaint by the various defendants on the ground that the assessment of taxes was not a legal or valid one were sustained, the other grounds, which were not passed on, being that no cause of action is set forth, that the conveyances to defendants from the lessee are not set out or attached to the complaint, and that the complaint is vague, uncertain and unintelligible.

The only point of law relied on by plaintiff being that it was erroneous to sustain the demurrers, the judgment will have to be affirmed if any of the grounds of the demurrers are well taken, that is, if the conclusion of the district magistrate was correct it must be affirmed irrespective of his reasons.

This is a proceeding under a statute which must be strictly complied with and pursued only so far as permitted by the statute. *Carter v. Wing Chong Wai Co.*, 12 Haw. 291, 294.

Under our statute (Sec. 2089 R. L.) it is provided that "whenever any lessee * * * of any lands * * * shall hold possession of such lands * * * without right

Colburn v. Holt, 19 Haw. 65.

* * * the person entitled to such premises may be restored to the possession thereof in manner hereinafter provided." It is further provided by Sec. 2094 R. L. that the writ of possession which follows judgment for plaintiff "shall issue to the high sheriff, or to any sheriff or police officer of the city or district where the premises are situated, commanding him to remove all persons from said premises and to put the plaintiff or his agent into the full possession thereof."

From all that appears in the complaint defendants may be rightfully in possession of the lands by virtue of holding the other undivided third interest of the lessor therein, and consequently even if plaintiff got judgment they could not be removed from the premises and plaintiff put into the full possession thereof as provided in the statute. This statute, which as pointed out must be strictly followed, does not contemplate an action in a case like the present unless at least it is alleged that the defendants are not in possession of the lands by virtue of the ownership of the remaining one-third interest of the lessor. As such an allegation has not been made, it follows that the demurrers will have to be sustained on the ground that no cause of action is set forth.

In *King v. Dickerman*, 11 Gray 480, an action of summary possession was brought by a landlord owning nine-tenths of certain premises against his tenant who it appeared from the evidence was also entitled to the possession of the other one-tenth. The court held that the action could not be maintained, saying, "The difficulty is that in such case the plaintiff is not entitled to possession of the demised premises to the exclusion of the defendant. Both parties have a legal right to the possession of the estate and of every part and parcel thereof, according to their respective titles. But this process is strictly a possessory one. The entire fruit of the judgment is a mere writ of possession, by which the officer is required to eject the tenant. It is difficult to see how such a process can legally be

Colburn v. Holt, 19 Haw. 65.

issued against a party, who being a tenant in common with the plaintiff, is after judgment still entitled to remain in possession; or how it is practicable to serve it by ejecting a person who has a right to occupy the premises as tenant with the plaintiff."

The judgment appealed from is affirmed.

C. W. Ashford and *C. A. Long* for plaintiff.

A. G. M. Robertson, Holmes & Stanley, W. W. Thayer and *E. M. Watson* for defendants.

PELEAUMOKU (w) v. MAKANEOLE (k).

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

SUBMITTED MARCH 23, 1908.

DECIDED MAY 15, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

DIVORCE—*collusion in prosecution of suit.*

A libel for divorce brought at the instigation and for the benefit of the defendant upon his agreement to pay the plaintiff money is properly dismissed on the ground of collusion.

OPINION OF THE COURT BY BALLOU, J.

This is an appeal by the plaintiff from a decree of the circuit judge refusing and dismissing a libel brought by her to obtain a divorce from her husband on the ground of wilful and utter desertion for the term of three years. The libel was dismissed upon the ground "that the parties herein had connived and colluded together for the purpose of bringing the present suit."

The evidence showed that the parties were married in 1887 and lived at Wainiha in the district of Hanalei, Kauai, until

Peleaumoku v. Makaneole, 19 Haw. 68.

1893 when the defendant deserted his wife and went to live in adultery with a woman named Kua, with whom he has ever since lived at said Wainiha. The plaintiff had her husband and Kua arrested for adultery for which offense they were tried and convicted. Two children of the plaintiff and defendant, born prior to the desertion, are still living one with the plaintiff and the other with the defendant's relatives.

The defendant filed no answer and presented no defense. He was called by the plaintiff's attorney as a witness to the marriage. When recalled by the court he testified as follows:

"I don't mean to defy the law by living with a wahine manu-ahi. I came here by request of the attorney. After my divorce, I shall marry the woman I am living with. I helped to bring this suit with that object in view. I testified as to my marriage. Was brought here under a subpoena. Have had a talk with my wife that we should get this divorce and then I should marry Kua. I knew my wife was bringing this divorce. I asked my wife before she brought the suit, that if she brought this suit I could marry Kua. I went to her because I felt I was guilty in having deserted her. I offered to help her with money if she procured the divorce."

The plaintiff was recalled and testified: "I heard what my husband said just now that he would pay me some money if I obtained a divorce. That is true."

The question presented by this appeal is whether this agreement authorized the refusal of the divorce. While there is no statute expressly making collusion a ground for the dismissal of the petition in this case, this follows by necessary implication from R. L. Sec. 2234 providing for the procedure when collusion is suspected as well as from the general law relating to divorce which will govern in the absence of statute. *Kalua v. Kamaua*, 4 Haw. 58.

In the case at bar there was no collusion to present to the court false testimony in support of the libel, nor was it shown that there were any specific facts material to the defense which might have been brought forward by the respondent. The

Peleaumoku v. Makaneole, 19 Haw. 68.

question, therefore, is squarely raised whether collusion means an agreement to deceive the court by putting in false matter or suppressing material matter, or whether an agreement merely as to the prosecution of the suit and costs is collusion.

Bishop says: "If the suit is carried on by a plaintiff, not from any desire of his own to obtain the remedy, but for the benefit and at the request of the defendant, there are several principles which would lead to its dismissal. And, as already explained, this collusive resorting to the court for a real purpose other than the pretended one is, in a divorce case, one of the forms of collusion." Bishop, *Marriage and Divorce*, Sec. 29.

The case cited in the text (*Lloyd v. Lloyd*, 1 Swab. & Tr. 567), is similar to the case at bar except that there an agreement as to the procurement of evidence existed and emphasis was laid upon the thirtieth section of the English divorce act which provides, "That if the court shall find that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall dismiss the said petition." A more recent English case, however, discusses this aspect of collusion upon broad principles and both its statement of the question presented and its ultimate conclusion may be quoted. In that case, which was a libel for adultery brought by a husband against a wife under circumstances substantially similar to the case at bar, the court says:

"The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it was urged that collusion is agreement either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the Court granting a divorce. It was insisted that, in a suit against a wife, unless it be shewn that the petitioner's charge of adultery was in fact unfounded, or was supported by false evidence, or that material facts in support of defence or recrimination were concealed, there can be no collusion. On the other hand, it was maintained that collusion has a wider scope, and that if

Pelcaumoku v. Makaneole, 19 Haw. 68.

there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and, a fortiori, if such agreement contains terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shewn that adultery was not in fact committed, or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shewn to have been concealed. There would seem, therefore, to be four questions that may be asked. First, is it collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms of its conduct, by agreement, though there be no express stipulation that there shall be no defence, and no specific ground for suspicion that a false case is put forward or material facts concealed? Secondly, does the addition of a term that there shall be no defence render such an agreement collusion? Thirdly, is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed? Or, fourthly, is there collusion only when it is shewn that, in consequence of such an agreement, false matter has been introduced into the case or material facts suppressed?"

After a careful review of the English authorities both before and after the passage of the divorce act the court concludes:

"It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot however much the parties to it may otherwise desire, be altered, except on the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought. * * * No doubt the protection to the Court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling

Peleaumoku v. Makaneole, 19 Haw. 68.

defence and recrimination by a covenant of silence, he cannot wonder if the Court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem duello miscuit*. He appears before the Court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stowell, 'he has received a real injury and bona fide seeks relief.'" *Churchward v. Churchward* (1895), P. 7.

The reasoning and conclusions in this case commend themselves to our judgment. If in the case at bar the injured wife desires on her own account to be freed from her deserting husband, there is no objection to her filing a petition without any agreement on the part of the husband, but as long as it appears, as it does from the evidence in this case, that the suit is being prosecuted at the cost and instigation and for the benefit of the defendant the circuit judge in the discharge of the public duty confided to him was amply justified in dismissing the libel.

The decree appealed from is affirmed.

S. K. Kaeo for plaintiff.

No appearance for defendant.

IN RE PETITION BY EWA PLANTATION COMPANY
FOR ALLOWANCE OF APPEAL FROM DECISION
IN RE ASSESSMENT OF INCOME TAXES.

ARGUED MAY 12, 1908.

DECIDED MAY 15, 1908.

BEFORE HARTWELL, C.J., AT CHAMBERS.*

The taxpayer has filed a petition to be allowed an appeal to the United States Supreme Court from the judgment of

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

this court of January 27 last, reversing the decision of the tax appeal court and affirming the assessment made by the tax assessor. The facts shown by the records in the case are stated in the opinion of the court *In Re Assessment of Taxes, Ewa Plantation Company*, 18 Haw. 530, as follows:

"Ewa Plantation Company returned its gross income for the year 1906 at \$1,907,928.77 derived almost entirely from sales of sugar. Against this it claimed a deduction of \$1,290,109.76 under the heading 'Amounts expended in the purchase or production of movable property mentioned in Schedule A.' This with other deductions which are not in issue brought its net income, as returned, to \$577,929.56, on which the tax at two per cent. amounted to \$11,558.59. Included in the deduction of \$1,290,109.76, as shown by the books of the corporation, was the amount of \$85,304.36 written off as depreciation of its property against the crop of 1906. This item was disputed by the assessor, who subtracted it from the deduction claimed and assessed the net income at \$663,233.92 and the tax at \$13,264.65. The plantation appealed from the total assessment and was held to be entitled to a certificate of appeal. *Ewa Plantation Co. v. Holt*, 18 Haw. 362. The only controversy before the tax appeal court was upon the item of \$85,304.36 upon which the tax amounts to \$1706.09. The tax appeal court sustained the contention of the plantation that it was entitled to the deduction claimed, from which decision the assessor appeals to this court."

In this court also "the only controversy was upon the item of \$85,304.36 upon which the tax amounts to \$1706.09."

The petitioner bases its right of appeal solely upon the allegation "that the matter and amounts involved in the above entitled suit exceeds, exclusive of interest and costs, the sum of Five Thousand (\$5000) Dollars," the condition of appeal imposed by the act of March 3, 1905, amending Sec. 86, Organic Act. The act of August 13, 1888, 25 Stat. 433, ch. 866, provides that no appeal shall be allowed "unless the matter in dispute, exclusive of costs," shall exceed the sum of five thousand dollars. The expression in the judiciary act, Rev.

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

Stat. Secs. 691, 692, relating to the appellate jurisdiction of the United States Supreme Court is "matter in dispute." "Amount involved" appears in the act of May 17, 1884, 23 Stat. 24, ch. 57, Sec. 38, providing civil government for Alaska. These appear to be convertible terms. *Barry v. Mercein*, 46 U. S. 119; *Pratt v. Fitzhugh*, 66 U. S. 273; *Gray v. Blanchard*, 97 U. S. 564. In *Henk v. Baumann*, 100 Wis. 28, the court said that the term "amount involved" is "the amount actually in controversy between the parties." In *New England Mortgage Co. v. Gay*, 145 U. S. 128, the plaintiff sued for \$8500 and recovered \$6800, "So that the amount actually in dispute between the parties in this court is the difference between the amount claimed and the amount of the verdict." "It is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit." *Washington, etc., R. R. v. District of Columbia*, 146 U. S. 232. "There must be a controversy which involves pecuniary value exceeding \$5,000 for the party appealing." *Caffrey v. Oklahoma Ter.*, 177 U. S. 348.

"The judgment in this case is for \$7,275.16, but it appears affirmatively on the face of the record that of this amount \$2,669.03 was not disputed below. The defence related alone to the difference between these two amounts, which is less than \$5,000. The dispute here is only in reference to the amount contested below. Such being the case, we have no jurisdiction." *Jenness v. Citizens' National Bank of Rome*, 110 U. S. 52.

This was not an action to recover the tax but a proceeding to determine its amount, the difference between the parties, to which the controversy relates, being \$1706.09, which is all that is involved in the case. If the judgment were reversed on appeal the appellant would be the gainer to that amount and not otherwise.

The taxpayer's claim in support of its right of appeal is as

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

follows: That the result of the judgment affirming the assessment of the net income at \$666,233.92, upon which the tax would be \$13,264.65, is to affirm that assessment; that "if either the tax appeal court or the assessor had the power to levy an execution the amount would be fixed at \$13,264.65;" therefore, that this sum "is the amount or matter upon which the action is brought and issue joined," and "that the principles should apply as if an action had been brought for the recovery of \$13,264.65 in a court having jurisdiction to determine the amount of final judgment and to issue an execution upon the rendition thereof;" further that "The plaintiff's complaint in this cause is the assessment made by the Assessor for by his action he fixes the claim for payment to be made by the company to the Territory and if the amount of the assessment equals the jurisdictional requirement it is sufficient."

Smith v. Adams, 130 U. S. 167, is cited, in which the court says: "By matter in dispute is meant the subject of litigation, *the matter upon which the action is brought* and issue is joined and in relation to which, if the issue be one of fact, testimony is taken." *Cowell v. City Water Supply Co.*, 121 Fed. 53, defines the term as "the amount or value of that which the plaintiff claims to recover or the amount or value of that which the defendants will lose if the complainant obtains the recovery he seeks," and *Lee v. Watson*, 1 Wall. 337, defines it as "the subject of litigation, the matter for which the suit is brought and upon which issue is joined," and "in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed."

It is urged that even if it appear that the defendant has a complete defense "this does not change the jurisdictional amount if the original amount claimed in the declaration equals the amount required by the statute." *Schunk v. Moline, Melbourne & Stoddard Co.*, 147 U. S. 500; *Stillwell-Bierce v. Williamson Oil Co.*, 80 Fed. 68.

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

It is claimed that "The fact that the Tax Assessor admitted the correctness of certain of the calculations of the Ewa Plantation Company at the trial before the Tax Appeal Court does not affect the amount involved in the proceedings instituted by him when he levied the tax of \$13,264.65 against the company," the jurisdiction being complete when "it is necessary for the plaintiff to bring a defendant into court in order to obtain from him an admission as to the amount of plaintiff's claim and the remainder is less than the amount required by statute." *Fuller v. Metropolitan Life Ins. Co.*, 37 Fed. 154. The appeal being asked by the defendant the value of the matter in dispute is the amount of the judgment rendered against it, while in an appeal by a plaintiff it is the amount of the original claim. *Zeckendorf v. Johnson*, 123 U. S. 618; *Merrill v. Petty*, 16 Wall. 344.

In *Smith v. Adams*, 130 U. S. 167, a case to determine the validity of a statute of Dakota changing a county seat, the court said: "It is conceded that the pecuniary value of the matter in dispute may be determined not only by the money judgment prayed, where such is the case, but, in some cases, by the increased or diminished value of the property directly affected by the relief prayed or by the pecuniary result to one of the parties immediately from the judgment," and dismissed the appeal. In the *Cowell* case, 121 Fed. 53, the appeal was dismissed because "it is the amount or value of that which the complainant claims to recover or the sum or value of that which the defendant will lose if the complainant succeeds in his suit that constitutes the jurisdictional sum or value of the matter in dispute." In *Lee v. Watson*, 1 Wall. 337, the appeal was dismissed, an amendment having been made in the amount of damages claimed "for the purpose of bringing the case within the appellate jurisdiction." In the *Schunk* case, 147 U. S. 500, an action on promissory notes, some of which were not due, under the statute an attachment had issued against

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

the defendant's property. The court held that the plaintiff's claim to the entire sum was in good faith and not "simply to give this court jurisdiction." *Stillwell-Bierce v. Williamson Oil Co.*, 80 Fed. 68, was a bill for foreclosure of a mortgage to secure a note of \$3000. The defendant had paid \$1500 but the plaintiff denied the legal effect of the payment or appropriation of it made by the defendant, hence the amount in controversy was not lessened. 37 Fed. 163, was a bill for discovery and accounting, the plaintiffs claiming \$1231. The defendants claimed that the court had no jurisdiction because they admitted that \$1231 were due from a certain endowment fund. But as the plaintiffs sought to recover under the reserve dividend of their policy of insurance, the controversy was held to include the sum claimed. *Zeckendorf v. Johnson*, 123 U. S. 617, held that the amount of judgment with interest to its date determined the jurisdictional amount; and so *Merrill v. Petty*, 16 Wall. 344.

Undoubtedly, as shown by the cases cited, a defendant cannot deprive the plaintiff of his appeal by admitting that he owed enough to bring the balance below the jurisdictional amount and a judgment when made for the plaintiff determines that amount.

In this case, however, the only litigation in the tax appeal court and here was upon the sum to be deducted. If the taxpayer had appealed from the general assessment of the tax appeal court as it did from that of the tax assessor the question of the validity of the entire tax would have come up and required a decision affirming or disaffirming the assessment; but the Territory only appealed from the tax appeal court and solely, as shown by the record, upon the allowance of the disputed deduction.

If it were discretionary to allow this appeal and to leave the Territory to move in the United States Supreme Court for its dismissal, I should prefer that course. A justice of that

In re Taxes, Ewa Plantation Company, 19 Haw. 72.

court allows appeals upon an ex parte showing, but a justice of this court acts on such matters with full knowledge of the facts. If the right of appeal appeared on the facts to be an open question, I should prefer to allow it but the case shows that the amount involved does not exceed \$1706.09.

Petition denied.

H. E. Cooper for taxpayer.

C. R. Hemenway, Attorney General, for the Territory.

IN THE MATTER OF THE ESTATE OF ROBERT WILLIAM HOLT, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 3, 1908.

DECIDED MAY 18, 1908.

HARTWELL, C.J., WILDER AND BALLOU, J.J.

WILLS—Rule in Shelley's Case.

The Rule in Shelley's Case is not law in this Territory.

WILLS—trusts.

This court having previously held that the following clause in a will created a trust, "I give, devise and bequeath to my son * * * one-quarter of all my estate, both real and personal, the income of the same to be paid to him by my executor hereinafter named for his use and support for the term of his natural life, and after the death of my said son I give, devise and bequeath the said one-quarter to the heirs of the said * * * and their assigns," that ruling is followed.

TRUSTEE—appointment by judge in probate.

It is erroneous for a circuit judge sitting in probate upon an administrator's petition for the distribution of an estate to appoint a trustee.

Estate of Holt, 19 Haw. 78.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by John F. Colburn, trustee, from a decree of a circuit judge in regard to the distribution of the property by the administrator de bonis non of the estate of R. W. Holt with the will annexed.

The final accounts of the administrator having been approved, Colburn filed a petition before a circuit judge of the first circuit sitting at chambers in probate, alleging his ownership of all property bequeathed and devised by the will to John D. Holt and James R. Holt, and praying that the administrator convey to him in fee simple certain lands referred to and distribute and deliver to him in absolute ownership all the personal property remaining in the hands or under the control of the administrator. The circuit judge denied the petition in so far as it sought a distribution in fee simple of the lands and in absolute ownership of the personal property, and entered a decree ordering that the property in question be distributed to Colburn subject to the terms of the will and to other conditions unnecessary to refer to here.

Colburn is the successor in interest of John D. Holt and James R. Holt, sons of R. W. Holt, to each of whom the testator bequeathed and devised "one quarter of all my estate, both real and personal, the income of the same to be paid to him by my executor hereinafter named for his use and support for the term of his natural life, and after the death of my said son I give, devise and bequeath the said one quarter" to his heirs and their assigns.

The first claim of appellant is that each of the sons, John and James, took a fee simple estate under the will by virtue of the Rule in Shelley's Case. It was held in *Thurston v. Allen*, 8 Haw. 392, that the Rule in Shelley's Case was not law here. Later it was held that that holding was not obiter dictum. *Rooke v. Queen's Hospital*, 12 Haw. 375, 389. The question is not now open to argument. Therefore, it must be

Estate of Holt, 19 Haw. 78.

held that each of the sons took only a life estate. See *Long v. Holt*, 18 Haw. 290.

The next contention is that the will expresses no trust which gives the executor or any one else the right of management and control of the property. This contention is without merit because it has already been decided adversely to the claim of appellant in *Dreier v. Holt*, 18 Haw. 179, followed by *Long v. Holt*, 18 Haw. 290. See also *Harris v. Judd*, 3 Haw. 421; *In re Guardianship of Holt*, 11 Haw. 146.

In *Harris v. Judd*, which was a submission on an agreed statement, one of the claims was that the will of R. W. Holt created the executor a trustee "to hold the said real and personal estate thereby devised and bequeathed and to pay over one-quarter of the net rents, issues and profits of the said estate to the said Owen Jones Holt" (whose interest under the will was the same as Colburn's predecessors) "for and during the term of his natural life for his use and support with remainder to the heirs of the said Owen Jones Holt and their assigns." Two of the justices expressly held and the third justice assumed that the will created a trust.

In re Guardianship of Holt was an appeal by James R. Holt and John D. Holt, Colburn's predecessors, from an order putting them under a spendthrift guardian. One of their contentions was that the will of their father, R. W. Holt, created a trust, a claim which is in conflict with that which is now advanced by their successor in interest.

It is argued, however, that the holding in *Dreier v. Holt*, 18 Haw. 179, contrary to appellant's present contention, was a dictum. That was a case to foreclose a mortgage of a grandson of R. W. Holt which included, besides other property, the mortgagor's interest in the land devised by the will of his grandfather. It was claimed that, as no conveyance of such interest had been made to the grandson after the death of his father, he could not mortgage it. Thus it became necessary

Estate of Holt, 19 Haw. 78.

to inquire whether the grandson had any interest in the lands devised by the will of his grandfather and if so how he acquired it, and therefore the holding of the court that the will created a trust and that upon the death of the life tenant the statute of uses rendered unnecessary a conveyance by the trustee to the remainderman was not a dictum. It is true that in *Long v. Holt*, 18 Haw. 290, which followed the Dreier case on the point in question, it was held that the administrator de bonis non of the estate of R. W. Holt with the will annexed could not maintain a bill in equity as to the construction of the will, but it will be noticed that the reason for such conclusion was that the previous decisions of this court had already decided all that concerned the administrator in regard to the will.

It is finally urged by appellant without waiving his previous claims that in accordance with another petition which he presented the administrator de bonis non with the will annexed should be ordered to distribute to him in fee an undivided two-thirds of the land purchased during November, 1862, by W. A. Aldrich, executor of the will of R. W. Holt, upon payment by appellant to the administrator of the sum of \$9713.32, being two-thirds of the purchase price paid by the executor. These lands belonged to the firm of James Robinson & Co., the partners being James Robinson, Robert Lawrence and the testator. At the instance of the executor, the surviving partners consenting, all these lands were sold under a decree of a court of equity. At the sale the executor purchased with the funds of the testator the lands in question, the deed being to him as executor "and his successors in trust for the use and benefit of the legatees named and referred to in the last will and testament of Robert W. Holt, deceased, forever." In connection with this claim appellant offered evidence tending to show that the lands in question were purchased by the executor with the funds of the estate in pursuance of an agreement with

Estate of Holt, 19 Haw. 78.

the three sons of the testator, that after such purchase they should be rented to them at rentals sufficient to pay 10 per cent. of the purchase price, that the sons should have all the beneficial advantage of the purchase and that the purchase was made and leases executed accordingly. The action of the circuit judge in rejecting the evidence offered and dismissing the second petition referred to was so obviously correct that it is unnecessary to do more than affirm it.

There is another matter, however, which we cannot overlook, and which, although not referred to by counsel for the appellant in their brief or argument, requires a reversal of the decree, and that is in appointing Colburn a trustee under the will of R. W. Holt. So far as appears from the record, no one, not even Colburn himself, petitioned that this appointment be made, no process issued citing in any of the interested parties in the matter, no appearance was made by any one except Colburn, and, more than that, it was made by a circuit judge sitting in probate, which was erroneous. *In re Estate of Enos*, 18 Haw. 542, 547. We have no doubt that, on application by an interested party, a court of equity will, after citing in all necessary parties and having a hearing on the matter, appoint a trustee to carry out the terms of the trust. To this trustee the personal property should be delivered, and, while we express no opinion as to the title of the administrator de bonis non to the lands in question, it would be appropriate for him to transfer to the trustee whatever rights, whether of possession or otherwise, he has in connection therewith.

For the foregoing reasons the decree appealed from is reversed and the cause remanded.

C. W. Ashford (with whom *E. M. Watson* was on the brief,) for John F. Colburn, trustee.

Shaw v. Boyd, 19 Haw. 83.

JONATHAN SHAW v. WILLIAM W. BOYD; WAIALUA AGRICULTURAL CO., LTD., GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE, WAIALUA, OAHU.

ARGUED MAY 25, 1908.

DECIDED MAY 29, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

GARNISHMENT—*procedure under sequestration statute.*

Under R. L. Sec. 2115A and 2115B a garnishee is entitled to any lawful set-off accruing before final judgment, but may be ordered to pay a sum equal to 25 per cent. of the salary of an employee accruing from and after judgment irrespective of set-off.

STATUTES—*construction.*

The intent of the legislature is to be gathered from the language used, and general considerations of motive should not be resorted to unless the language is obscure or ambiguous.

SET-OFF AND COUNTER CLAIM—*store account of employee.*

Under R. L. Sec. 2698 the written consent of an employee to the set-off of his store account may be general and given in advance.

OPINION OF THE COURT BY BALLOU, J.

Plaintiff brought his action before the district magistrate of Waialua alleging that the defendant, being indebted to plaintiff in the sum of \$75 for use and occupation of certain premises, promised to pay on request but had not done so. There was a prayer for judgment and a garnishee summons was issued against the Waialua Agricultural Co., Ltd., the printed portion of which required garnishee "to appear personally at the time and place above named, then and there upon oath to disclose whether it have, or at the time said copy was certified had, any of the goods or effects of said defendant in its hands and if so the nature, amount and value of the same, or whether said garnishee is indebted to said defendant and the nature and

Shaw v. Boyd, 19 Haw. 83.

amount of said debt." Interlined immediately thereafter were the words "and whether defendant receives a regular salary or wages from garnishee."

Defendant was defaulted, but the garnishee appeared and its manager testified that the defendant was an employee receiving a salary of \$100 per month, but was in debt to the company in the sum of \$109.80. It was admitted that this indebtedness was on store account and the garnishee offered in evidence the following printed instrument stated to be "an assignment of his salary to the company on account of his store bill."

"No. 3021.

Waialua, June 1st, 1907.

To the Waialua Agricultural Company, Limited.

In settlements from time to time had between myself and the Waialua Agricultural Company, Limited, you are hereby authorized and empowered to deduct from any wages due and payable to me anything I may owe on store account to the said company.

Dated Waialua, the 1 day of June, 1907.

(Signed) W. W. BOYD.

Witness:

JOHN LITTLE."

The district magistrate gave judgment for the plaintiff for the amount sued for with costs and entered the following order:

"The garnishee is hereby ordered to withhold 25 per cent. of defendant's salary (monthly) until the amount of judgment is fully satisfied." From this order the garnishee appealed to this court on points of law, claiming that the district magistrate erred in entering the order and that Act 99, S. L. 1907, is unconstitutional as interfering with the right of a private contract.

At the outset plaintiff claims that it would be unlawful for the garnishee to deduct or set off the defendant's store account from or against his wages and that, therefore, the whole of any salary which might be due the defendant at time of service is

Shaw v. Boyd, 19 Haw. 83.

subject to garnishment, relying upon R. L. Sec. 2698 which reads:

“It shall be unlawful for any person, firm, partnership or corporation, within this Territory, to deduct and retain any part or portion of any wages due and payable to any laborer or employee, or to collect any store account, offset or counter claim without the written consent of such laborer or employee or by action in court as provided by law.”

In reply to the written consent offered in evidence it is urged on behalf of the plaintiff that if such general consent of the laborer given in advance is valid the whole intent of the law is frustrated and that the section should be construed as referring to a written consent to be given after the store account has been incurred.

The intent of the legislature, as gathered from the language used, is the primary consideration in statutory construction, but the general motive with which the legislature may be supposed to have passed the act, such as a consideration of the mischief sought to be remedied, should be resorted to only in construing language which is obscure or ambiguous. *Denn v. Reid*, 10 Pet. 522, 527. Although it must be conceded that under the practice in evidence in this case the protection to the employee sought to be conferred by the statute is largely illusory, this would not warrant us in reading into the statute a term relating to the time when the written consent must be given not inserted therein by the legislature, particularly as a subsequent section makes a violation of the statute a penal offense. The testimony showed, therefore, that at the time of the trial there was nothing due from the garnishee to the defendant subject to garnishment.

The next point for consideration is the effect of R. L. Secs. 2115A and 2115B as enacted by S. L. 1907, Act 99, and now for the first time brought before this court for construction. The sections are as follows:

Shaw v. Boyd, 19 Haw. 83.

“Section 2115A. If it shall appear upon the trial of any cause wherein service has been made as provided by law upon any attorney, agent, factor or trustee of a defendant, that such defendant is in receipt of any salary, stipend, wages, annuity or pension from such attorney, agent, factor or trustee, the Court before which such trial is had shall order and direct such attorney, agent, factor or trustee not to pay to such defendant or permit or cause to be paid to him more than seventy-five per cent. of such salary, stipend, wages, annuity, or pension, which shall then be or shall thereafter become due, owing or payable to such defendant until the suit against him shall have been finally determined and the final judgment obtained against him, if any, shall have been fully paid with legal interest thereon; provided, however, that no more of such salary, stipend, wages, annuity or pension shall be thus withheld from said defendant in advance of final judgment than shall be sufficient to meet the demand of the plaintiff or plaintiffs in such suit or suits together with costs and legal interest.

“Section 2115B. In case there shall be certified to such garnishee a judgment for the plaintiff, from or to which no appeal or execution shall, at the time of its rendition, have been noted it shall be incumbent upon such garnishee to pay to such plaintiff such sum or sums as shall theretofore have been sequestered and not drawn against in pursuance of such suit if such judgment shall equal or exceed such sum or sums. If the amount so sequestered and not drawn against shall not suffice to extinguish such judgment, then such sequestration and delivery to such plaintiff by such garnishee of a sum equal to twenty-five per cent. of such salary, stipend, wages, annuity or pension shall continue from week to week, or from month to month, until such judgment, with legal interest thereon, shall be fully paid, or until such defendant shall quit the service of and dissolve his relation to the garnishee upon which sequestration is founded.”

It is true that the garnishee is neither an attorney, agent, factor or trustee of the defendant in the primary meanings of those words, but the word “trustee” has a well defined secondary meaning in connection with garnishment which gives the name “trustee process” to garnishment proceedings in several states.

Shaw v. Boyd, 19 Haw. 83.

"The word 'trustee' as used in the various provisions of the statutes relating to trustee process, manifestly denotes the debtor or agent of the principal defendant, i. e. the persons against whom an action ex contractu at law only might be maintained in favor of the principal defendant and is not used in its technical sense." *Cross v. Brown*, 19 R. I. 220, 249.

An examination of the statute as amended discloses a difference in phraseology in regard to proceedings before and after judgment. It will be noted that no rights under the new sections attach upon the service of process, but the rights and liabilities of the parties up to the date of trial remain as fixed by R. L. Secs. 2114, 2115 and 2116. From the time of trial until final judgment the garnishee may be ordered not to pay more than 75 per cent. of the salary which shall then be or shall thereafter become due, owing or payable. It may fairly be considered that no salary becomes due, owing or payable if the defendant is indebted to the garnishee and therefore during this period the garnishee would be entitled to the benefit of any lawful setoff. After judgment, however, the garnishee may be ordered to deliver to the plaintiff a sum equal to 25 per cent. of the defendant's salary until the judgment is fully paid or the defendant quits the service of the garnishee. Here there is no qualification that the salary must be due and owing or that it actually be the salary of the defendant, but the apparent intention is to give the plaintiff priority over all claims to an amount equal to 25 per cent. of the salary.

We find nothing unconstitutional in such a provision. The right of private contract is not interfered with by legal process directed against property which may be the subject matter of the contract. Attachment, garnishment, mechanic's liens, judgment liens, condemnation proceedings and all other processes which determine the priority in which a debtor's effects shall be applied or which result in compulsory sequestration of property may affect property under contract or in regard to which

Shaw v. Boyd, 19 Haw. 83.

the owner desires to contract, yet they afford the due process of law required by the constitution.

The order of the court in this case does not specify when the withholding of the twenty-five per cent. of defendant's salary is to begin, but in the absence of a date would properly be construed as having no retroactive effect but as referring only to salary accruing from and after the date of final judgment. Thus construed it is correct as far as it goes. It may be assumed that the money withheld should be paid to the plaintiff or the plaintiff may move that the order be modified to express this more clearly.

The order appealed from is affirmed.

Lyle A. Dickey for plaintiff.

D. L. Withington and *W. A. Greenwell* (*Castle & Withington* on the brief). for garnishee.

IN THE MATTER OF THE APPLICATION OF HARRY
T. MILLS FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 25, 1908.

DECIDED JUNE 3, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CONTEMPT—*judgment of, appeal from, mittimus.*

No appeal lies from a judgment of direct criminal contempt. A mittimus, reciting that the petitioner by, etc., was adjudged guilty of direct contempt of court in that he took part in a fight with one T. in the court room when the court was engaged in the trial of a case entitled, etc., on, etc., and was summarily sentenced to pay a fine of \$10 or be imprisoned until the fine should be paid, for a term not to exceed ten days, and that it appeared that the fine had not been paid, sufficiently complies with the

In re Mills, 19 Haw. 88.

statute requiring that the particular circumstances of the offense be fully set forth.

HABEAS CORPUS—*review of facts on which contempt is adjudged—fighting in court.*

The court will consider in habeas corpus whether the facts on which a contempt was adjudged constitute the offense but will not question their truth nor allow them to be contradicted. Fighting in presence of the court is prima facie culpable.

OPINION OF THE COURT BY HARTWELL, C.J.

The petitioner obtained a writ of habeas corpus April 23 for inquiry into the legality of his detention by the sheriff under a mittimus of the district court of Honolulu, which reads as follows:

"IN THE DISTRICT COURT OF HONOLULU

"COUNTY OF OAHU,

"TERRITORY OF HAWAII.

"In the matter of Contempt of Court of Harry T. Mills.
Mittimus.

"THE TERRITORY OF HAWAII:

"To the High Sheriff of the Territory of Hawaii, his deputy, the Sheriff of the County of Oahu, or his deputy:

"Harry T. Mills having been adjudged, in our District Court, of Honolulu, County of Oahu, guilty of a 'Direct Contempt of Court' in that he took part in a fight with one F. E. Thompson, in the Court Room, in open Court and when the Court was in session and actually engaged in the trial of a case entitled, Harry T. Mills versus C. A. DeCew, on the 20th Day of April, A. D. 1908, and having been by the said Court on said day summarily sentenced to pay a fine of Ten Dollars (\$10) or to be imprisoned until such fine shall be paid, such term of imprisonment not to exceed a period of ten days, and it appearing that said fine aforesaid has not been paid,

"You are ordered to take said Harry T. Mills into your custody and to cause said sentence to be executed,

"Hereof fail not,

"Frank Andrade

"District Magistrate of Honolulu,

"County of Oahu.

"Dated at Honolulu, this 21st day of April, A. D. 1908."

In re Mills, 19 Haw. 88.

The incident referred to in the mittimus is described in the petition as having arisen and proceeded as follows: On Monday, April 20, 1908, while the petitioner was addressing the court in the case referred to, Thompson, the defendant's attorney, after accusing the petitioner of having insulted him on a former occasion, assaulted, struck and grappled with him in the presence of the court, without fault or provocation of the petitioner who assumed an attitude of defense and did not return or retaliate the assault but deported himself strictly upon the defensive in the endeavor to ward off the attack and defend himself; that Thompson having been dragged away from petitioner through the interference of others, the court caused the entry to be made in the minutes of the cause: "At this stage Mr. Thompson assaults Mr. Mills, and they had tussled, and they were fined, by the court in the sum of \$10 each. Mr. Mills notes appeal;" that the court made no judgment that the petitioner was guilty of contempt but issued a mittimus, which, as the petitioner is informed and believes and alleges upon such information and belief, commanded the sheriff to take the petitioner into custody, but not mentioning any acts showing that he had been guilty of contempt; that upon the same day the petitioner filed his appeal to the circuit court and has since perfected it by tendering costs which were refused, and that the appeal has not been certified to the circuit court or in any wise disposed of; that about April 21 the magistrate withdrew the first mittimus, which, as the petitioner has been informed by the magistrate, was destroyed and another mittimus, of which the foregoing is a copy, was issued.

The petitioner alleges that the mittimus under which he is held is invalid because (a) it is not supported by any judgment of the court to the effect recited in it and the petitioner has not been adjudged to be guilty of a direct contempt; (b) it does not allege facts sufficient to constitute contempt, or to show

In re Mills, 19 Haw. 88.

that the petitioner was acting otherwise than in the legitimate and necessary defense of his person.

The sheriff's return, April 24, shows that April 23, in response to the writ, he produced the petitioner before the judge who released him on his own recognizance pending the return and hearing; that the respondent was restraining the petitioner of his liberty under a judgment and sentence of the district magistrate of Honolulu in a proceeding pending before the magistrate April 20 wherein the petitioner was found guilty of a contempt of court in fighting in the court room before the magistrate during the progress of the proceeding then pending in which the petitioner was plaintiff and one DeCew was defendant and wherein the petitioner, upon being found guilty of contempt, was sentenced by the magistrate to pay a fine of \$10, which judgment and sentence were entered by the clerk of the district court upon the records of the court as follows: "April 20th 1908, 1.30 P. M. Frank E. Thompson. Harry T. Mills. Each adjudged by the court as guilty of a contempt of court in that they took part in a fight with each other in open court while the court was in session and engaged in the trial of a case entitled Harry T. Mills v. C. A. DeCew on this 20th day of April, 1908. Each sentenced to pay a fine of \$10.00;" that after the judgment and sentence the petitioner, having refused to pay the fine, was on the same day ordered by the magistrate to be imprisoned by the respondent until the fine should be paid, the term of imprisonment not to exceed ten days.

The return alleges that the petitioner's contemptuous conduct consisted among other things in his aggressive, noisy and disturbing acts and doings while engaged in a fight with Thompson during which the petitioner was aggressive in his manner, retaliated the assault and by scuffling, grappling with and fighting Thompson did greatly disturb the trial and proceedings "then and there being had;" and further that on the same day,

In re Mills, 19 Haw. 88.

April 20, the magistrate caused a mittimus to be issued setting out that the petitioner had been convicted of contempt of court in that he had taken part in the fight with said Thompson in open court while it was in session and in the actual trial of the case and commanding the respondent to take the petitioner into custody under the judgment and sentence above set out, and, on April 21, issued another mittimus amendatory of the first which through inadvertence was lost or destroyed, and that the petitioner was being held under the mittimus referred to in the petition.

The petitioner filed an answer April 25 alleging on information and belief that the judgment set out in the return was not entered prior to his arrest, denying the averments concerning his aggressive conduct and affirming that "the fight and disturbance occurred in the manner set forth in his petition."

When the case came on for hearing the petitioner produced a witness who, after testifying that he saw in the district court "an altercation or difficulty between the petitioner, Harry T. Mills, and one Frank E. Thompson," was asked to describe it. The respondent's objection to the evidence was sustained and also his objection to evidence offered to show that the petitioner was assaulted by Thompson and simply endeavored to defend himself, committing no overt acts, and that he was not the aggressor. The petitioner, although allowed to do so, offered no evidence to show that the judgment mentioned in the return had not been rendered prior to his arrest. After hearing counsel the circuit judge remanded the petitioner who appealed to this court.

The questions presented by the case and which have been argued with clearness and precision are as follows, namely: (1) Was the petitioner's appeal from the sentence imposing upon him a fine of \$10 for contempt allowable under Sec. 1858 R. L., "Appeals shall be allowed from all decisions of district magistrates, whether civil or criminal, to the circuit court of

In re Mills, 19 Haw. 88.

the same circuit," notwithstanding the provision in Sec. 1860 R. L. that "Nothing herein contained shall be construed to permit an appeal to be taken from any order by any judge or magistrate allowing any warrant, attachment, writ or other process, or for any other order of a like nature," and if this question is answered in the negative (2) does the mittimus comply with the requirement of Sec. 3073 R. L. that "Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in such judgment and in the order or warrant of commitment," and if this question is answered in the affirmative (3) is it an offense per se to take part in a fight in a court room while the court is engaged in the trial of a cause, or, as claimed by the petitioner, is the fighting reprehensible only when provoked by the party censured or carried to an extreme unnecessary for self protection?

(1) At common law an order punishing for contempt is not appealable and cannot be reviewed, every court being regarded as the exclusive judge of a contempt committed in its presence or against its process. *Ex parte Kearney*, 7 Wheat. 38; *New Orleans v. Steamship Co.*, 20 Wall. 387; *Hayes v. Fischer*, 102 U. S. 121.

Onomea Sug. Co. v. Austin, 5 Haw. 604 (1886), discusses the statute above quoted, holding that exercise of "the power of a court to maintain its dignity by summary punishment for contempts" is not appealable under the proviso that the general statute shall not be construed to permit an appeal from orders allowing warrants, attachments, writs or other process, "or for any other order of a like nature."

The common law enactment of 1892 had not then been passed, but is now in force except as otherwise provided by statute, precedent or usage.

The legislature has since provided, Act 21 S. L. 1903 (Sec. 3073 R. L.), that "Every judgment, sentence or commitment

In re Mills, 19 Haw. 88.

for a civil contempt or for a constructive or indirect criminal contempt shall be subject to appeal," implying that no appeal is allowed from a commitment for a direct criminal contempt. *In re Anin*, 17 Haw. 336. Question 1 must be answered in the negative.

(2) It is suggested that the mittimus is defective in failing to set forth such particulars as, who was the aggressor, whether the fight was with natural or artificial arms, fists or deadly weapons, whether both of the combatants or only one was to blame, whether either was fighting merely in defense of life or limb. It is urged that fighting in court may be proper or improper, justifiable or unjustifiable, according to the particular circumstances of the case, which therefore are required by the statute to be set forth in full in the judgment and commitment in order that it may appear whether the court had abused its discretionary power by adjudging innocent and blameless conduct to be a criminal contempt.

The petitioner's claim would not be satisfied by a statement in the mittimus that his fighting was not justifiable or was not justified by any of the circumstances nor by a partial or incomplete statement, as, for instance, that he was first attacked. It would be necessary not only to allege that he used no more force than was needed to repel the attack, but also in conformity with *King v. Sherman*, 1 Haw. 150, and *King v. Bridges*, 5 Haw. 467, that he had no other method of avoiding the attack, the doctrine that violence is not necessarily excused by violence, when homicide results, being adopted in those cases. The conduct in self defense must be such as is reasonably necessary for protection.

The right of self defense has its limitations, to the observance of which courts and the public are entitled. For instance, if the one attacked prolong his defense longer than was required for his own safety or decline the aid of others or use unseemly or undesirable methods of defense he may not avoid being

In re Mills, 19 Haw. 88.

held for contempt by invoking his inherent right of self defense.

Most of the citations upon the requirement that the circumstances be fully set forth in the warrant appear to be cases of constructive contempts. Thus in *Goetz v. Stutsman*, 73 Ia. 693, contempt for violating an injunction, the warrant recited that the plaintiff had been convicted of contempt in violating the terms and conditions of an injunction in a case pending in court and that the offense was proved by witnesses. "The statement of facts seems to be sufficiently full for the purposes of this case." In *Wilcox v. State*, 46 Neb. 402, contempt for refusing to be sworn and refusing to testify, it was held that the judgment was fatally defective in failing to set forth that the witness refused to affirm as well as to be sworn. *Poertner v. Russel*, 33 Wis. 193, contempt for violating an injunction, held that the record sufficiently showed the particulars in which the injunction had been violated in specifying that they had "violated the aforesaid injunction and order." In *Commonwealth v. Perkins*, 124 Pa. 36, a commitment for contempt was held to be insufficient because "it wholly fails to show the nature of the contempt." *Ex Parte Rowe*, 7 Cal. 181, holds that "refusing to answer certain questions propounded to the witness by the grand jury" was insufficient description of a contempt "because it does not appear whether the questions were legal or not." In *People v. Court of Sessions*, 147 N. Y. 290, the commitment merely showed that at the day named the parties in the case appearing in person and by counsel and after hearing counsel the court "did determine and adjudge" that the relators were "guilty of criminal contempt of court." The contempt consisted in publishing newspaper articles reflecting upon the trial court. The New York statute, which was like our own, contained "no new doctrine," the general rule being that "no person shall be punished for contempt of court, which was a criminal offense, unless the specific offense

In re Mills, 19 Haw. 88.

charged against him was distinctly stated." The commitment was held to be insufficient in failing to set forth the articles. In *Ex Parte Rickert*, 126 Cal. 244, the alleged contempt consisted in instructing the secretary of a corporation defendant in the case before the court not to produce certain books which the court had ordered him to produce. The commitment was not accompanied by an affidavit, as required by statute, showing the facts constituting the contempt, and therefore the petitioner was discharged.

It is true that fighting in court may be justified by various circumstances but in order that the mittimus should set forth circumstances showing that it was unjustifiable on the theory that fighting is in itself blameless, a comprehensive and elaborate recital would be required such as is not used in any indictment charging "an affray by fighting." It would be immaterial and would not be averred in such indictment whether fists or pistols were used or that the person indicted was not brought into the affray for the purpose of self protection, while a verdict of guilty would imply that no justification was shown. The fighting under the circumstances set forth in the mittimus was prima facie culpable, and while the statute requires that in review of a commitment for contempt "No presumption of law shall be made in support of the jurisdiction to render such judgment or pronounce such sentence or order such commitment" (Sec. 3073 R. L.), a negative is not required to be averred or proved, nor does the statute require the particularity of statement of an indictment at common law. It is not necessary even in an indictment under our statute to aver that the act charged was done "with force and arms" or "against the peace." Sec. 2831 R. L.

And so "On the general principle that it is unnecessary to deny that which the other side would properly affirm in defence, it is well settled that an indictment for a statute offence need not negative the provisos, or show that the defendant is

In re Mills, 19 Haw. 88.

not within the benefit of the exceptions in the distinct clauses of the statute." *King v. Hulu*, 3 Haw. 82.

In looking at the acts enumerated by the statute, Sec. 3069 R. L., as punishable contempts, it would seem that a warrant of commitment reciting a judgment of contempt by "open resistance to the process of the court" would require that the process be mentioned but not enumeration of facts showing "open resistance," while for contempt by "insulting, contemptuous, contumelious, disrespectful or disorderly language, behavior or act, or breach of the peace, noise or other disturbance," the language, behavior, act or circumstances of the disturbance ought to be specified. Contempt by refusing to answer any legal and proper interrogatories ought to show what they were, and so of "publishing animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice" in order that it may appear whether as a matter of law they would so tend. So of "malicious invectives against a court or jury tending to bring such court or jury, or the administration of justice into ridicule; contempt, discredit or odium," they should be named for the same reason. Fighting would be "disorderly behavior, noise or other disturbance in the presence of the court."

It cannot be said of such conduct that it is "necessarily innocent or justifiable." *People v. Hackley*, 24 N. Y. 78; *Ex Parte Senior*, 37 Fla. 1 (32 L. R. A. 135).

In any way of looking at this matter we think that the mittimus sufficiently sets forth facts and circumstances which constitute a direct contempt of the court and we therefore answer question 2 in the affirmative.

(3) The argument that the petitioner ought to have been allowed to prove his averments that the conduct for which he was held in contempt was a justifiable defense of his person is based on the assumption that this would not be contradicting the adjudged fact that he took part in a fight but would merely

In re Mills, 19 Haw. 88.

supplement the record by showing such additional facts, not contradicting it, as would exonerate him. This contention could be sustained in no other way than by regarding the conduct set forth in the mittimus as blameless or at the least as having a negative character. However it might be regarded under other circumstances or in other than the peaceful, guarded surroundings of a court of justice, as, for instance, in case of an ordinary street fight, the taking part in a fight in court during the progress of a trial is necessarily of a positive character, requiring justification, and not prima facie innocent or colorless conduct. In *Ex Parte O'Neal*, 125 Fed. 967, the relator was held for contempt in resisting an officer of the federal court in the execution of its orders. The additional facts allowed to be presented to supplement the record "do not materially change the status of the case" as "it would seem to be immaterial whether at the time of the resistance the court was actually in session with a judge present in the district, or whether the place of resistance was forty or four hundred feet from the actual place where the court was usually held."

But the facts which the petitioner offered to show would contradict the record in so far as they remove culpability from the act which had been held to be a contempt. If the court had termed the petitioner's conduct disorderly behavior by taking part in a fight evidence would not be allowed to show that the behavior was not disorderly.

In habeas corpus a retrial of facts is never allowed, the questions for consideration being whether the court had general jurisdiction, which was not exceeded, and whether the facts stated in the warrant show that an offense of contempt was committed. Question 3 is answered in the affirmative.

Order appealed from affirmed.

R. P. Quarles (*C. W. Ashford* with him on the brief) for petitioner.

F. W. Milverton, Deputy Attorney County of Oahu, for respondent.

Territory v. Pottle, 19 Haw. 99.

TERRITORY OF HAWAII v. JOHN H. POTTIE.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED MAY 11, 1908.

DECIDED JUNE 19, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CONSTITUTIONAL LAW—*statute regulating practice of veterinary medicine.*

A statute regulating the practice of veterinary medicine and requiring veterinaries to be licensed, which is applicable only to a town and suburbs with a population of over 5000 inhabitants, is unconstitutional and void.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by defendant on points of law from a decision of the district magistrate of Honolulu convicting him of practicing veterinary medicine without a license in a town and suburbs of over 5000 inhabitants contrary to act 40 of the Laws of 1905. He claims that the act is unconstitutional in that it violates section 1 of the 14th amendment to the Constitution by discriminating against persons engaged in the same business or profession and denying to them the equal protection of the laws.

In the discussion of this question it is only necessary to quote Secs. 1, 4 and 6 of the act, which are as follows:

“Section 1. No person shall practice veterinary medicine, surgery or dentistry, as a profession, in any town and suburbs with a population of over 5000 inhabitants in the Territory of Hawaii, either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself publicly or privately as prepared or qualified to so practice without having first obtained from the Treasurer under the seal of his Department, a license in form and style substantially as in this Chapter set forth.

Territory v. Pottle, 19 Haw. 99.

"Provided, however, that nothing in this Act shall be construed to prevent the medical, surgical or dental treatment of stock by the owners or the employees of owners or by neighbors who do not assume to be practitioners of veterinary medicine, surgery or dentistry or by members of the medical profession in cases of emergency, and

"Provided further, that this Act shall not apply to commissioned Veterinary Surgeons of the United States Army.

"Section 4. No applicant for a license to practice veterinary medicine, surgery and dentistry, shall be examined unless he shall have paid to the Treasurer a fee of Ten (\$10.00) Dollars.

"Section 6. Any person who shall practice veterinary medicine, surgery or dentistry, as a profession in any town and suburbs with a population of over 5000 inhabitants in the Territory of Hawaii, or who shall offer or attempt to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, contrary to the provisions of Section 1 of this Act, or whose license to so practice shall have been revoked according to law shall be guilty of a misdemeanor, and shall be liable, on conviction, to a fine of not more than Two Hundred and Fifty (\$250) Dollars."

That the legislature may regulate the practice of veterinary medicine by requiring licenses of those who desire and are found qualified to engage in it and prohibiting the practice without such a license, and that in so doing it may classify such persons, so long as it is done fairly and reasonably, are propositions which are conceded by the defendant. But it is insisted that this act cannot stand because it established an unreasonable and purely arbitrary discrimination in prohibiting the defendant from practicing unless he procures a license and allowing others to practice without any license.

In *Barbier v. Connolly*, 113 U. S. 27, 31, it was said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or

Territory v. Pottle, 19 Haw. 99.

arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.”

Territory v. Pottie, 19 Haw. 99.

In *Gulf, etc., Railway v. Ellis*, 165 U. S. 150, 165, it was said:

“It is apparent—that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.”

In *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 562, it was said:

“It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283. We said in that case that ‘the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion.’ And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary.”

“But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.” *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 111.

“But a statute would not be constitutional which should prescribe a class or a party for opinion’s sake or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempted.” *Cooley Const. Lim.* 481.

Territory v. Pottle, 19 Haw. 99.

These quotations contain general principles which are well understood and have been frequently approved. The usual difficulty is in the application of these rules to particular statutes. That legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate is not prohibited is but another way of saying that classification is allowable if based upon some reasonable ground. But it must be remembered that differences which would serve for a classification for some purposes do not because of that fact furnish a reason for a classification for all legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. The legislature cannot adopt an arbitrary classification, for it must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity of different legislation in respect thereto. Any law based upon such a classification must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class.

Coming to the act in question, we see that it prohibits the practice of veterinary medicine without a license in towns of over 5000 inhabitants, which is made criminal. The license only issues to an applicant after he has been examined and found to be possessed of the necessary qualifications, and for the privilege of taking this examination he must pay to the government a fee of \$10 whether he gets his license or not. In all other towns and places in the Territory any one, whether possessed of the necessary qualifications or not, may practice without a license. So far as we are aware, the towns of Honolulu and Hilo are the only ones having a population of over five thousand. The act in short, then, prohibits the practice of veterinary medicine without a license in Honolulu and Hilo

Territory v. Pottle, 19 Haw. 99.

and makes no provision for any other locality or part of the Territory.

This statute deals with one class of persons, namely, veterinaries, of whom some are and some are not required to be licensed and their practice regulated, depending upon whether they practice (1) in Honolulu or Hilo, or (2) elsewhere in the Territory. It is difficult to perceive any reason for this classification. It requires no more skill, experience and integrity to be a veterinary in a town of six thousand inhabitants than in one of four thousand or one thousand or any less number. This discrimination seems to be an arbitrary one permitting some and forbidding others to carry on the same business without regard to their competency or to any material difference in their situation. For the right to carry on his calling one is not, while another, who may be his equal or superior in learning, experience and ability, is required to procure a license and pay a fee of \$10 therefor. It does not appear that this classification is based upon any reasonable ground which bears a proper or any relation to the subject matter of the act, and it looks like an arbitrary selection. It may be suggested that the people in towns of over five thousand inhabitants are more in need of protection from fakirs and quacks and others who are unable to procure a license than those in smaller towns, in other words, that the people in the country are better able to take care of themselves than those in the cities, but, even if that is so, it furnishes no reasonable ground of classification within the general principles referred to. It may also be suggested that no one would attempt to practice outside of the towns mentioned and consequently there is no need to provide for licensing in other parts of the Territory than Honolulu and Hilo, but we do not know that in view of the well known fact that in this Territory the great bulk of animal stock is situated outside the limits of Honolulu and Hilo. While classification by population may and often does furnish a reasonable basis

Territory v. Pottle, 19 Haw. 99.

for discrimination in relation to other subjects, we cannot see how it can be considered reasonable with respect to the practice of veterinary medicine in these islands.

Bessette v. People, 193 Ill. 334, involved the validity of an act to regulate the practice of horseshoers and requiring them to be licensed. It applied only to cities and towns of fifty thousand inhabitants and over, but permitted cities and towns of a population between fifty thousand and ten thousand to adopt its provisions, and exempted cities and towns of less than ten thousand inhabitants. The court held that this created an arbitrary and unjust discrimination between persons engaged in the same occupation which rendered the statute unconstitutional, although it was also held to be invalid on other grounds. It was said on page 348:

“Clearly the act unjustly and unreasonably discriminates between persons engaged in the same kind of occupation. The mere fact of the location of the individual in the particular town or city forms no basis for a classification. Why should a man pursuing the business of horse shoeing who lives in a city containing fifty thousand inhabitants or over be required to take out a license while a man living in a city containing between ten thousand and fifty thousand inhabitants need not take out such license unless his city or town chooses to come under the provisions of the act, and the man who lives in a city or town containing less than ten thousand inhabitants is not obliged to take out any license at all?”

Although that was a case of horse shoeing, the principle is the same as the one in the case at bar.

A statute prohibiting stock from running at large which was applicable to counties having a population of not less than 30,000 nor more than 34,000 as well as those with a population of 55,000 and over and also to any county adjoining one of these with a population of 35,100 and over, while other counties could adopt it by a majority vote, was held invalid by reason of making an unnatural, arbitrary and capricious classification. *Sutton v. State*, 96 Tenn. 696.

Territory v. Pottle, 19 Haw. 99.

An act requiring in cities of 10,000 inhabitants or over which have a system of sewer or waterworks the licensing of plumbers is invalid as it adopts an arbitrary basis of classification. *State v. Justus*, 90 Minn. 474.

See also *Murray v. Board*, 81 Minn. 359; *State v. Hinman*, 65 N. H. 103; *State v. Pennoyer*, 65 N. H. 113.

Without going into the other matters discussed we are satisfied that the act is unconstitutional.

Judgment reversed, defendant discharged.

C. R. Hemenway, Attorney General, and E. W. Sutton, Deputy Attorney General, for the Territory.

Thompson & Clemons and A. S. Humphreys for defendant.

McBRYDE SUGAR COMPANY, LIMITED, v. KOLOA SUGAR COMPANY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 1, 2, 1908.

DECIDED JUNE 22, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EQUITY—*jurisdiction*.

Equity has jurisdiction to enjoin the diversion of water long used under claim of right, upon proper proof of that right, which jurisdiction is not ousted by the creation of a statutory tribunal with authority to decide water controversies.

EQUITY—*parties*.

A bill is not demurrable because a person against whom no relief is sought and who, upon the allegations, asserts no right adverse to the plaintiff, has not been made a party.

EQUITY—*pleading*.

A bill for an injunction is not demurrable because certain matters are alleged as averments of fact based upon information and belief.

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106

OPINION OF THE COURT BY HARTWELL, C.J.

This was a bill praying for a temporary injunction to restrain the defendant from continuing to molest, interfere with or obstruct the natural flow of the waters in the easterly branch of the Omao stream as the same flowed prior to December 20, 1907, and from otherwise in any way diverting or appropriating the waters thereof and from continuing to maintain certain dams referred to in the bill, and from maintaining any dams, ditches, flumes or tunnels or other means of carrying or diverting the same water or from continuing to interfere with the plaintiff's use of its right of way along the easterly branch of the stream until further order of the court, and that upon final hearing the injunction be made permanent.

The bill avers that the petitioner is informed and believes and on such information and belief alleges that December 18, 1874, Annie Knudsen, owner of the ahupuaa of Koloa and of all the konohiki water rights appurtenant thereto by ancient custom, leased to James W. Smith certain parts of the ahupuaa for twenty-three years; that the lease was made for the cultivation of sugar cane and under it the lessee and his successors in title began and established a sugar planting interest upon the demised premises as well as upon certain other lands owned or thereafter acquired by him in fee simple; that under and by virtue of said lease and by virtue of the ownership of the fee simple lands said James W. Smith was entitled to appropriate, enjoy, dispose of, control and use, and by and in building up said planting interests came by the year 1880 or thereabouts to appropriate, dispose of, control, enjoy and use upon the demised premises and his said fee simple premises, among other waters and streams, all of the water and water rights of the Omao stream and all branches thereof including their konohiki water rights, and otherwise to control all of the normal and freshet waters thereof including the right to the uninterrupted

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

flow of all the waters of said stream and its branches, including the freshets thereof, without any upper or higher diversion or interruption on the part of said Annie Knudsen or any person claiming under her or otherwise;

That the petitioner is informed and believes and on such information and belief alleges that said exclusive use, control and enjoyment of all said waters and water and konohiki rights by said James W. Smith continued continuously and exclusively in him and his successors in title under and by virtue of said lease and the ownership of said lands by him, and a further lease dated February 4, 1896, from the same lessor to Jared K. Smith for a term of nineteen years from September 1, 1896; that the successors in title under the first lease and to the fee simple lands of James W. Smith were a copartnership known as A. H. Smith & Co., and that during the year 1890 they, by virtue of said original lease and ownership of said fee simple land, had in possession, disposed of, controlled and used in connection with the fee simple land and leasehold lands and owned, among other waters and stream, all of the water and water rights of the said Omao stream and its branches including the freshets flowing in the same and all the konohiki rights in the waters thereof and had all of said water rights in possession during said year of 1890 as first takers thereof without other or higher interruption or diversion by said Annie Knudsen or any one claiming under her or by any other person or corporation; that by the lease of February 4, 1896, said Annie Knudsen leased to Jared K. Smith all the premises and waters and water and konohiki rights theretofore held, enjoyed and controlled by said James W. Smith and his successors in title under said original lease, said Jared K. Smith taking the second lease in trust for the benefit of himself, Emma C. Smith and Anna Juliette Smith then owning the original lease and the said fee simple lands of James W. Smith; that September 4, 1896, said Annie Knudsen, then being owner in fee simple

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

of the ahupuaa of Koloa, sold and conveyed in fee simple to Jared K. Smith, Emma C. Smith and Anna Juliette Smith all the lands and hereditaments situate in Koloa, describing the same by metes and bounds, which comprised the premises leased by the lease of February 4, 1896;

That the petitioner is informed and believes and on such information and belief alleges that at the time of said conveyance all of the water and water rights in said Omao stream and its branches, including the freshet water thereof as well as other waters and stream together with all the konohiki rights therein, except so much as was appurtenant by prescription to said fee simple lands, were being held, enjoyed, controlled, disposed of and used by said Jared K. Smith, Emma C. Smith and Anna Juliette Smith upon and in connection with the premises conveyed to them in fee by the deed of September 4, 1896, and that all the said waters and water rights and the konohiki rights therein, including the right to control and dispose of the surplus and freshet waters thereof subject to an exception as to the fee simple lands, then appertained to and were being held, enjoyed and used with the premises so conveyed and as a part thereof and passed to and were conveyed thereby in fee to the grantees including the right to an uninterrupted flow of all the waters of said stream and branches without upper or higher diversion or interruption by said Annie Knudsen or any one else, and thereafter continuously hitherto all said waters, water rights and konohiki rights in said stream and its branches have been openly, continuously, exclusively and under claim of ownership used, enjoyed, controlled and disposed of by the said grantees and their successors in title to the lands conveyed by said deed and to the lands held originally in fee simple by said James W. Smith, and that the said konohiki rights and the right to said waters constituted a vital and essential part of the consideration and inducement which led the grantees to pay the grantor the sum of \$30,000 as con-

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

sideration for said deed; that by a series of mesne conveyances all the lands, easements, water rights and property acquired by the grantees under said deed and all of the lands owned in fee simple by said James W. Smith became the property of and now are owned in fee simple by the plaintiff and have been used, enjoyed, controlled and disposed of by it absolutely as it sees fit, except the Bindt lot, so-called, containing 4.03 acres, and certain water rights for use of the Smith homestead and then used through certain pipes, flumes and ditches; that September 20, 1907, while plaintiff was in the exclusive, undisputed and peaceful use, possession, control and enjoyment of said waters and konohiki rights, the defendant, without prior notice or demand, seized and appropriated all of the water of the easterly branch of the Omao stream and by means of two dams and a tunnel diverted all of the water of the said stream to its premises adjacent to the plaintiff's lands and has since continuously diverted and appropriated all of the water of said stream and allowed none of it to go down its ancient course to the Omao river and has wholly deprived the plaintiff of the use and enjoyment thereof and threatens to continue said diversion and appropriation;

That plaintiff is informed that the defendant claims that said stream rises on certain portions of the ahupuaa of Koloa which are leased to it and that by virtue of a lease from Annie S. Knudsen of August 26, 1890, it is entitled to all of the konohiki rights of the ahupuaa of Koloa and by virtue of said konohiki rights and certain water rights acquired from native kuleana holders below that it is entitled to appropriate the water, and in so doing that it has not taken more than its fair share of the water of Koloa; and further that many years ago some person unknown to the plaintiff used such a ditch at the point in question and took waters from said stream thereby and that a few years since one Rego while cultivating cane upon the defendant's land, with its permission, placed a dam in said

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

easterly branch of said Omao stream and took water therefrom ;

Whereas plaintiff says that for over twenty years said easterly branch has been used exclusively, openly and continuously and under a claim of right by the plaintiff and its predecessors in title and not at all by the defendant or any one else, except that said Rego some years ago while planting cane for himself on the defendant's land surreptitiously and without claim of right led water out of said stream and used part of it on his cane, at which time Weinzheimer, now manager of the defendant corporation, then an overseer of its lands, tore down the dam and returned the water to its ancient course, and upon interrogation McLane, then manager of the defendant corporation, admitted to the plaintiff that the attempted diversion of said water was unlawful and promised Stodart, manager of the plaintiff corporation, that it would not take place again; that otherwise the plaintiff has had exclusive and undisputed use of said stream since its purchase and that it bought the land and water rights in question from the Koloa Agr. Co. upon the faith and in the belief that it was entitled to all the waters and water and konchiki rights of said easterly branch of Omao as well as the main stream of Omao; that upon the plaintiff discovering the said diversion of water by the defendant one of said dams was, January 29, 1908, torn down and the water returned to its ancient channel and to the use, possession and control of the plaintiff; that upon the following night the defendant reconstructed the dam and renewed the diversion of water; that the plaintiff's servants and agents, under its instructions, then proceeded along the easterly branch of the Omao stream in lawful, peaceful and proper use of plaintiff's right of way up and along said stream with the intention of tearing down the dams, but upon arriving there found it covered with Japanese, the defendant's servants, who with force and

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

arms resisted the attempts of plaintiff's employees to remove the dams and turn the water back into its ancient channel;

Plaintiff denies the truth of any of defendant's contentions as to its right in the easterly branch of the Omao stream or its right to divert the waters thereof, except as above set forth;

That by reason of the premises the petitioner is suffering and has suffered great and irreparable damages in that said water is appurtenant to and necessary to the proper maintenance of its cane fields upon its lands at Koloa and that without the water irreparable damage will be done to the cane fields from the petitioner's inability to acquire and store water against the dry months now near at hand whereby great injury and depreciation will be caused to its crops which cannot properly be computed or valued in money, and that the petitioner has no adequate remedy at law in the premises and that it apprehends serious loss and damages by the diversion of water which the petitioner says amounts under normal conditions to one million gallons a day and is worth in fee \$30,000; that upon erecting the dams and tunnel the defendant thereby diverted the whole of the easterly branch of the Omao stream and left no water at all to the petitioner, in violation not only of its prescriptive rights but of the ancient water rights of the land of Omao and the lands and property acquired by the petitioner from the Koloa Agr. Co., and that unless the defendant is restrained great and irreparable injury will ensue to the petitioner in the loss and diversion of said waters and in the obstruction thereto and in depriving the petitioner of the use of said right of way, the petitioner having planted its said lands in cane at Koloa relying in part upon said supply of water for the maintenance thereof and that the area planted in cane upon its Koloa lands and now growing thereon would not have been planted nor would there have been justification for planting of the same in full but for reliance upon the waters of the easterly branch of the Omao stream as well as other water supplies owned by

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

it and in its use and possession, and that it is too late in the season to develop an alternative or substitute supply, and that said waters of the easterly branch have been used openly, continuously and adversely for over twenty years in the cultivation of cane by the petitioner and its predecessors in title upon said Koloa lands held in fee by the petitioner.

The written instruments referred to in the bill are (a) the lease of December 18, 1874, from Mrs. Annie Knudsen to James William Smith for twenty-three years from January 1, 1875, of "all the lands of Koloa Komohana, Aepo and Kaohe situate at said Koloa and bounded east by Koloa Hikina and the Mission premises—north by the Meeting House Lot—the cemetery and lands leased by R. W. Wood, west by Land called Keekee, south by the Sea, reserving however Kuleanas and Lot leased to J. D. Neal by Lot Kamehameha under lease dated 17th day of August A. D. 1861 for 20 years;" (b) lease of February 4, 1896, from Mrs. Annie Knudsen to Jared Knapp Smith for nineteen years from September 1, 1896, of "all that land except as hereinafter mentioned situate at said Koloa, and known as the Ahupuaa of Koloa, and also all portions of land and any kuleanas within the said Ahupuaa that have up to the date of these presents been purchased in any manner since the vesting in fee of the said Ahupuaa in the party of the first part, excepting all such portion, parts and parcels of land of the said Ahupuaa of Koloa as are held by the Koloa Sugar Company under lease dated the twenty-sixth day of August A. D. 1890, and recorded in Liber 128 on pages 304, 305 and 306, it being understood that all kuleanas not owned by the party of the first part are expressly excepted;" (c) conveyance of September 1, 1896, by Annie S. Knudsen to Jared Knapp Smith, Emma C. Smith and Anna Juliette Smith, for a consideration of \$30,000, of "all and singular the lands and hereditaments situate in said Koloa, and described by metes and bounds in the Schedule hereunder written, excepting Kuleanas not owned

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

by the grantor, and being all of the same premises leased by the grantor to said Jared Knapp Smith by lease dated the fourth day of February, 1896, surrender of which said lease is hereby made by said Jared Knapp Smith and accepted by said grantor. To have and to hold the premises hereinabove granted and conveyed or expressed and intended so to be together with all the rights, easements, privileges and appurtenances thereunto in any wise belonging or appertaining unto the said grantees their heirs and assigns forever." The deed contains covenants of seizin in fee simple; good right to sell and convey; that the granted premises are free from all encumbrances, and of general warranty; (d) lease of August 26, 1890, from Annie S. Knudsen to the Koloa Sugar Co. for twenty-five years from September 1, 1890, of "that certain piece or parcel of land situate at Koloa Island of Kauai and known as the Ahupuaa of Koloa and also all portions of land or any Kuleanas within the said Ahupuaa, that have up to the date of these presents been purchased in any manner since the vesting in fee of the said Ahupuaa of Koloa in said party of the first part, except all such portions, parts or parcels of land of the said Ahupuaa of Koloa as are held in possession of A. H. Smith & Co., at the date of these presents, and except the parcel of land in said Ahupuaa known as the 'Bindt Lot' and furthermore except that certain parcel of land in said Ahupuaa held as a teacher's house lot, and it being understood that all Kuleanas not owned by the party of the first part are expressly excepted."

The defendant demurred to the bill on the grounds:

"I. That said bill of complaint does not state facts sufficient to entitle plaintiffs to the equitable relief sought, or to any equitable relief;

"II. That said complaint does not allege in positive and direct terms the facts upon which the prayer for relief is predicated.

"III. That the facts alleged by plaintiff upon information

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

and belief do not disclose the source of information or nature of belief and are not charged to rest within the defendant's knowledge and not within the knowledge of the plaintiffs.

"IV. That the matters in said complaint alleged on information and belief do not show that positive knowledge is not attainable or and that danger of injury is immediate.

"V. That said bill is uncertain and indefinite in this that paragraph two (unnumbered) of said bill upon which the so-called prescriptive right of plaintiff is predicated does not show or purport to show the source of complainant's information, the nature of the belief, nor does it show the manner in which said alleged 'Konohiki' water rights were acquired, nor does it show the branches of Omao stream.

"VI. That said bill of complaint affirmatively discloses a nonjoinder of parties defendant, to-wit, said Annie Knudsen.

"VII. That paragraph four (unnumbered) of said bill is insufficient in law and uncertain in this that the allegations thereof are predicated upon information and belief and do not disclose the source and nature of such information and belief.

"VIII. That paragraph five (unnumbered) of said complaint is indefinite and uncertain in that it does not disclose or purport to disclose the nature of said 'mesne conveyances' by whom made and the rights acquired thereby.

"IX. That the Court is without jurisdiction to hear and determine the matters in said bill of complaint alleged."

The circuit judge overruled the demurrer and granted the prayer for a preliminary injunction. The defendant appealed from the decree overruling the demurrer.

The defendant contends that the circuit judge of the first circuit has no jurisdiction in equity over a water controversy relating to lands on Kauai, although it is conceded that if the bill had been brought for a temporary injunction until determination of a proceeding at law this objection might not have been good; but, the argument is, the bill seeks to try the title to the waters, and Act 56 S. L. 1907 makes it the duty of the circuit judges "within their respective circuits to hear and determine all controversies respecting rights of private ways

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

and water rights." Sec. 1833 R. L. gives to circuit judges original and exclusive jurisdiction of every original process in which relief in equity is prayed for except when a different provision is made; Sec. 1834 provides that they may hear and determine in equity all cases thereafter mentioned "when the parties have not a plain, adequate and complete remedy at the common law," and that they "shall have full equity jurisdiction according to the usage and practice in courts of equity in all other cases where there is not a plain, adequate and complete remedy at law;" by Sec. 1648 they have power at chambers within their respective jurisdictions "to hear and determine all matters in equity." The exercise of this power is not limited to cases arising within the respective circuits as is done in divorce, probate, guardian and partition matters.

Wailuku Sug. Co. v. Cornuwell, 10 Haw. 476, approved in 13 Haw. 195 and 14 Haw. 550, held that the jurisdiction of a commissioner of water rights over a water controversy does not exclude equity jurisdiction over water rights. Act 56 S. L. 1907, giving to circuit judges "jurisdiction to hear and determine all controversies respecting rights of private ways and water rights" and making it "the duty of said judges, within their respective circuits, to hear and determine all controversies respecting rights of private ways and water rights," transfers to circuit judges the jurisdiction in those matters formerly exercised by commissioners of water rights. The original statute, S. L. 1856 p. 16, provided for commissioners to hear and determine all controversies respecting rights of way and to "give such decision as might in each particular case appear to them to be just and equitable;" by act of August 28, 1860, S. L. 1860 p. 12, they were given power to hear and determine all controversies respecting rights of water. It was not the intention of the legislature that the jurisdiction of the commissioners should supersede the general jurisdiction of equity over such controversies, but merely that a simple, expeditious and

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

inexpensive tribunal should be created to determine these matters without a jury and without the formal procedure of equity. A water controversy may involve equitable as well as legal rights. It may amount to a mere trespass. The fact that the law afforded a sufficient remedy in damages would not have excluded the jurisdiction of the commissioners in water controversies. Nor under Act 56 would a circuit judge have jurisdiction in only such cases as could be brought in equity. The transfer to circuit judges of the commissioners' previous jurisdiction over water controversies does not do away with their equity jurisdiction in such cases. They now hear and determine water controversies relating to property within their circuits, using the procedure provided by statute for such cases and still have general equity powers which they exercise "according to the usage and practice of courts of equity" when the parties have not a "plain, adequate and complete remedy at the common law," whether the case relates to property within their circuits or not. *Dole v. Gear*, 14 Haw. 564.

We do not regard the decision in the *Cornwell* case as resting solely on the ground that the "creation of a special tribunal to hear a certain class of cases does not necessarily oust the jurisdiction of the superior courts."

"It is a general principle, often followed by this court, that if equity jurisdiction exists in the absence of a statutory remedy at law, it is not taken away by the grant of such a remedy. The jurisdiction in equity does not cease and revive from time to time with the enactment and repeal of statutes which confer a remedy at law." *Dole v. Gear*, 14 Haw. 564.

Under Sec. 1833 R. L. the jurisdiction is exclusive "except when a different provision is made," but Sec. 1834 includes all the cases therein mentioned when the remedy at common law is inadequate, as well as all other cases where the remedy at law, meaning by statute as well, is inadequate. The cases include suits concerning nuisance. It is a private nuisance to

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

divert or obstruct a water course. *Gardner v. Newburgh*, 2 Johns. Ch. 164.

In *Parker v. Winnipiseogee Lake Co.*, 2 Black, 545, the plaintiff brought a bill to restrain the defendant from taking the waters of the lake to supply the Merrimac river in time of drouth in order to secure a sufficient motive power for manufacturing establishments on the river to the plaintiff's injury and damage in the use of the water to which he claimed to be entitled. It was urged at the hearing that the plaintiff had not established his right by an action at law, and although the objection was not taken by demurrer or in the answer, the court held that, being a jurisdictional objection, it might be enforced by the court sua sponte though not raised by the pleadings nor suggested by counsel. Treating the case as a private nuisance the court held that "the concurrent jurisdiction of courts of equity in cases of private nuisance dates back to an early period in the growth of the English equity system," and that "it is now too firmly established to be shaken," but that "the case must be one of strong and imperious necessity or the right must have been previously established at law."

The case of *Harman v. Jones*, Cr. & Ph. 301; 41 Eng. Rep. 505, which is cited by the defendant in support of the claim that only the circuit judge of the fifth circuit has jurisdiction and that the case is triable not in equity but only under Act 56, illustrates the rule that when equity is asked to protect legal rights which are disputed they are required to be established at law, an injunction being granted temporarily to prevent irreparable injury pending the action. The limitation of the rule is that when the legal right is reasonably clear and there is no uncertainty of the principles of law involved, its establishment at law is not required but equity will ascertain the existence of the right as well as protect it. This is especially true of illegal diversion of water and illegal interference with water rights.

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

Equity has disposed of numerous important water controversies in this jurisdiction in which questions of legal right were passed upon. *Peck v. Bailey* (1867), 8 Haw. 658; *Cha Fook v. Lau Piu*, 10 Haw. 308; *See Yick Wai Co. v. Ah Soong*, 13 Haw. 378; *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 14 Haw. 50; *Same v. Same*, 15 Haw. 675; *Lum Ah Lee v. Ah Soong*, 16 Haw. 163.

“It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved.” *Holland v. Challen*, 110 U. S. 25.

Manbeck v. Jones, 190 Pa. 174; *Richmond v. Bennett*, 205 Pa. 475; *Perkins v. Foye*, 60 N. H. 496; *White v. Tide Water Oil Co.*, 50 N. J. Eq. 7.

The defendant claims that Mrs. Knudsen should be joined as defendant because “directly interested in obtaining or resisting the relief prayed for” and “materially interested in the subject matter.” But neither of these facts is apparent from the bill which does not show that she had anything to do with the diversion of the water or asserts any right to it, but alleges that the water and water rights went to the plaintiff and its predecessors in title with the conveyance of her land to the Smiths and that she has since asserted no claim to them.

As no relief is sought against her and as she is not shown to be connected in interest with the subject matter of the suit, she is not a necessary party. *Union Mill Co. v. Dangberg*, 81 Fed. 73.

The defendant contends that the plaintiff's claim by adverse possession since the date of the conveyance of 1896 and also by virtue of the conveyance itself, with its apparent easements of water, is inconsistent. But a title may be pleaded as having been acquired in diverse ways in order that the party alleging title may have the benefit of proof showing that it was acquired

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

in any one of the ways. *Tuthill v. Skidmore*, 124 N. Y. 155. As long as the same kind of relief is asked by the bill the plaintiff may aver facts of a different nature which will equally support his application. Story, Eq. Pl., Sec. 254.

Several of the grounds of the demurrer relate to the form of the bill, the defendant claiming that the averments upon information and belief place in issue merely the information or belief. This is true of an averment of information and belief but not of averment of facts based upon information and belief. *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 323. "As a general thing injunctions ought not to issue upon statements of material matters made upon information and belief" (*McCandless v. Carter*, 18 Haw. 224), but when such averments are made it is unnecessary to state the source of the information or nature of the belief or that positive knowledge is not obtainable. The bill, however, in addition to the averments upon information and belief, contains a positive averment that for over twenty years the easterly branch of the Omao stream has been used exclusively, openly and continuously under a claim of right by the plaintiff and its predecessors in title, ten years of this term having elapsed since the date of the conveyance of September 1, 1896.

The objection that the mesne conveyances are not described by which the plaintiff acquired the property conveyed September 1, 1896, is not sustained. It is sufficient for the purposes of the bill that it avers that the plaintiff has obtained by mesne conveyances and owns the title secured by the conveyance. *Webber v. Gage*, 39 N. H. 185.

The facts averred in the bill, if proved or admitted, justify and require the relief sought and are averred with sufficient certainty, definiteness and clearness to inform the defendant of the nature of the claim against it and enable it to prepare its defense, and to enable the court to ascertain the plaintiff's

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

rights and render the proper decree if the bill should be adjudged true.

The averment that under the lease of 1874 the lessee, without opposition of the lessor, obtained control of and used the water which is claimed to have passed by the conveyance shows no right to the water other than such as may have been appurtenant to the lands, and in argument the plaintiff disclaims that it acquired any right thereby. It bases its right on the fact that at the date of the conveyance the water was in use upon the granted lands openly and under claim of right and therefore passed as an apparent easement or appurtenance; that the subsequent acquiescence of the grantor, as well as of the defendant, in such use is in the nature of a contemporaneous construction of the effect of the conveyance; that for the same reasons the portions of the ahupuaa then in possession of A. H. Smith & Co., which are excepted from the lease to the defendant of August 26, 1890, carried the water and rights then in use upon them without opposition by the lessor, and that at any rate the right has been acquired by prescription from continuous and open use since made under claim of ownership.

Upon the claim of contemporaneous construction the plaintiff cites *Lourey v. Hawaii*, 206 U. S. 206, 222, the case citing *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269, "There is no surer way to find out what the parties meant than to see what they have done."

Without passing upon the validity of the claim of contemporaneous construction, if it is true, as the bill avers, that the grantees at the date of the conveyance were using the waters upon the granted lands without opposition from the grantor and that the water was necessary for the use which was then made of the granted premises, the right to such use passed with the grant as an implied easement. *Dunklee v. Wilton R. R. Co.*, 24 N. H. 507; *Simmons v. Cloonan*, 81 N. Y. 557; *Quinlan v. Noble*, 75 Cal. 250; *O. R. & L. Co. v. Armstrong*,

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

18 Haw. 261. And see *Thomas v. Owen*, 20 L. R., Q. B. D., 225; 1 Tiffany, Real Property, Sec. 317.

The defendant claims that the averments of the plaintiff's exclusive use, control and enjoyment of the water and water rights and that it was entitled to them under the lease are conclusions of law and as such not admitted by the demurrer.

The averments in *Alnutt v. Leper*, 48 Mo. 318, and *Laffey v. Chapman*, 9 Colo. 304, cited by the defendant, were that the plaintiff was "entitled to the exclusive possession," and "entitled to the possession of said lode." *McCloskey v. Barr*, 38 Fed. 165, also cited, held that alleging ownership in fee without stating how or from whom "does not state any fact or facts from which the court can see that the defendant is the owner;" that a plea that the defendant was in the open, notorious, continuous and exclusive possession as the sole owner, claiming and holding adversely to the complainants and all the world, was defective in not negating the averment in the bill that certain of the complainants were under disability when their rights of possession accrued, and in not showing when the adverse possession commenced, and that the plea was defective in stating a legal conclusion without giving the material facts on which the conclusion rested. The same objections were held to apply to a plea that the complainants at the time of bringing the suit and long before were ousted and disseized and out of possession of the premises.

The cases cited to sustain these rulings refer to negotiable paper or choses in action. "On the other hand the allegation that the plaintiff is seized in fee simple is a sufficient allegation that he has the possession as well as the title." *Gage v. Kaufman*, 133 U. S. 472.

The facts on which the plaintiff's claim of ownership is based are sufficiently pleaded.

The averment of the facts upon which irreparable injury is asserted is amply sufficient. Permanent appropriation of

McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106.

property may be an irreparable injury for which the law gives no adequate remedy such as equity gives. Upon this doctrine no other irreparable injury is required as ground for an injunction although the injury is not irreparable in any other sense. *Stevens v. R. R. Co.*, 20 N. J. Eq. 126, 130.

The demurrer was properly overruled. Decree affirmed.

W. A. Kinney and *R. B. Anderson* (*Kinney & Marx* on the brief) for plaintiff.

H. E. Cooper and *C. F. Clemons* (*Thompson & Clemons* on the brief) for defendant.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND
WILLIAM O. SMITH, TRUSTEES, v. THE TERRI-
TORY OF HAWAII.

ORIGINAL.

TRIED FEBRUARY 17-21, 1908.

DECIDED JULY 1, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CONTRACTS—*construction of condition.*

A condition attached to the transfer of a school that the grantee shall not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the grantor and summarized in the correspondence, is not, as interpreted by surrounding circumstances and subsequent practice, broken by a course of study including morning and evening prayer, compulsory attendance at Sunday school with preparation of the International Sunday school lessons, and compulsory attendance at Christian Endeavor exercises.

CONTRACTS—*construction of condition.*

A condition that a school shall be continued as an institution for the cultivation of sound literature and solid science is satisfied by a curriculum including classic and modern literature, geography, physiology, history, agriculture, arithmetic, book-keeping, algebra and geometry.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

DEEDS—*construction.*

A claim for a liquidated sum of money, arising as an alternative from the refusal of a third party to convey land upon condition broken, is not assigned by a previous conveyance of all lands in or to which the grantor has any claim or demand.

OPINION OF THE COURT BY BALLOU, J.

The plaintiffs brought an action against the Territory under R. L. Sec. 2000 to recover the sum of \$15,000, alleging a breach by the Territory of an agreement made in 1849 between the Kingdom of Hawaii and the American Board of Commissioners for Foreign Missions, the petitioners claiming to be successors of the board; the agreement in effect being that in consideration that the American Board would relinquish to the government its claim to certain land at Lahainaluna and transfer to the government the seminary buildings, furniture, books and apparatus therein, the government would continue the seminary at its expense as an institution for the cultivation of sound literature and solid science and would not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the mission and expressed in the confession of faith, a copy of which is attached to the petition; that in case of nonfulfilment of the conditions of the transfer, the property should revert to the Hawaiian Mission, to be held in behalf of the American Board or the government should at its option pay the sum of \$15,000.

The breach of this agreement alleged is that since 1903 the Territory has changed the institution to an agricultural school and taught no religious doctrine whatsoever, nor sound literature nor solid science. .

The defendant's demurrer to the petition, based on several grounds, was sustained on the ground that no condition was made which required the government to give religious instruction, but merely that no religious tenet or doctrine contrary to

Lowrey v. Territory of Hawaii, 19 Haw. 123.

those theretofore inculcated by the mission as set forth in a certain confession of faith should be taught; and that the agreement to teach sound literature and solid science was not broken by a failure to teach those branches of learning otherwise than they would be required to be taught in a technical school and a school of agriculture. *Lowrey v. Territory*, 17 Haw. 225.

Upon appeal to the United States Supreme Court the judgment on the demurrer was reversed on the ground that in view of the circumstances and conditions which preceded the contract and the construction placed upon it by both parties, as set forth in the petition, the agreement required the giving of religious instruction "upon the lines formerly pursued by the mission and subsequently by the government." *Lowrey v. Hawaii*, 206 U. S. 206, 223. The cause, having been remanded with directions to proceed in conformity with the opinion, has been heard upon a large amount of documentary and other evidence. The court has also referred to proceedings of a public nature of which it would ordinarily take judicial notice, and to documents from the public archives when specifically referred to in the exhibits on file.

The institution at Lahainaluna, originally called the High School and afterwards the Missionary Seminary, was founded by the missionaries of the American Board in 1831. From that date until 1849 it was the most notable of the educational institutions founded by the missionaries who, with all their intense theological convictions, still devoted the greater part of their lives to the secular education of an entire nation. The early years of the school were, however, marked with many vicissitudes. Cheever, *Sandwich Islands* 201. Plaintiffs' Ex. 21. The accounts of the seminary from missionary sources are usually laudatory while those of independent observers are far less flattering. Commodore Wilkes, who visited the seminary in 1841, and who is regarded as an unprejudiced observer from

Lowrey v. Territory of Hawaii, 19 Haw. 123.

the missionary standpoint (Cheever, Sandwich Islands 301, Plaintiffs' Ex. 21), reports:

"In all the departments of this establishment I saw nothing but ill directed means and a waste of funds that might have been avoided by proper forecast, and a full examination of the subject by practical men. The school has passed its meridian and is now fast going to decay, a fact which must strike every one on a casual visit." 4 Wilkes, United States Exploring Expedition, 247.

Whatever may have been the hopes of the founders of the seminary the internal testimony of subsequent years shows that the above criticism was well founded. In 1848 the principal's report personifies the seminary as follows: "Though she tries to keep up an appearance of her former greatness and seems sensible of the fact that she is less admired than formerly yet she stands at her post and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her." Report for two years ending May, 1848, Plaintiffs' Ex. 25.

During the next winter studies at the institution were practically broken up by sickness in the principal's family followed by successive epidemics of measles, influenza and whooping cough. School operations were suspended in February and no new class entered pending action of the general meeting of the mission. The report for that year says:

"A new class, according to custom, should be entered this year. It has not been called for yet by us because we thought it best first to hear what changes will actually be decided on by the mission at this meeting. The late unparalleled diminution of population may have also some effect in modifying the views of the mission in regard to this school and render it expedient in their minds to alter its operations or the number of its scholars, these with other reasons induced the teachers to defer the calling of another class until after this meeting of the mission.

"If it is decided by the mission to call a new class we wish

Lowrey v. Territory of Hawaii, 19 Haw. 123.

to present a few considerations to the brethren to guide them in their selections. Many thousand dollars of money have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class when they felt there were enough in the nation that would do honor to their training at the seminary." Report, June, 1848, to April, 1849, Plaintiffs' Ex. 26.

Besides these conditions and the emigration to the gold fields of California, also referred to in the report, the general meeting had to face an embarrassed condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From report of committee, April 25, 1849, Plaintiffs' Ex. J.) It was under these circumstances that the offer of transfer to the Hawaiian government was made.

The proposal of transfer, under date of April 25, 1849, was upon the express condition "that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science, and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government by the said Island Mission shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." The entire letter is set out in *Lowrey v. Hawaii*, 206 U. S. 206, 209.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

The confession of faith sent with the letter is evidently, as alleged in plaintiffs' declaration, a printed profession of faith, which, as introduced in evidence (Plaintiffs' Ex. J), is endorsed "Certificates of Church Membership," and reads as follows:

"The Lord Jehovah our Creator has given to the world a law which is holy just and good, that we should love him with the whole heart, and glorify him in all that we do.

"This law I have often broken, and have made myself exceeding sinful in his sight. Now I hate my sins, I repent of them, and renounce them. God so loved the world that he gave his Son that whosoever believeth in him should not perish but have everlasting life. He has invited me to come to him. This I have resolved to do, and to devote myself to his service. I adore his rich grace in calling me to the feast of the gospel. I do now hope for a part in the blessings of his wonderful redemption. I desire to do what I can to promote his glory and the salvation of my fellow men, and I feel it to be a duty and a privilege to take on me the vows of his everlasting covenant.

"I do therefore in the presence of God and before the world, make a solemn declaration of my faith.

"1. I believe in Jehovah;—that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is every where present and sees all things; that in power and wisdom, and goodness, in all perfections and excellences he is infinite; that he made the earth and the heavens, men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure; that he alone is God and that all beside him that are called gods are vanity and the work of errors.

"2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

"3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that consequently all mankind of every generation are naturally in a state of corruption, guilt and death.

"4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his

Lowrey v. Territory of Hawaii, 19 Haw. 123.

Son into the world, made of a woman and in the likeness of man.

"5. I believe in the Lord Jesus Christ: that he is the Son of God; that he died upon the cross as a propitiation for our sins, and for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justification unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the king of Zion, has all power in heaven and earth, and will judge the quick and the dead.

"6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

"7. I believe that in all ages, Jehovah has had a church in the world, in which he has graciously dwelt, and which he designs to establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

"8. I believe in the resurrection of the body; in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

"Dedication and covenant.

"And now in conformity with these sacred and momentous truths, and in the presence of angels and men I make a solemn dedication of myself and of my all; avouching this day, the Lord Jehovah, Father, Son and Holy Ghost, to be my God, my Father, my Savior, my Sanctifier, and humbly giving up myself to him my chosen portion, to be his, and only his forever. I acknowledge my everlasting and indispensable obligation to glorify God in all the duties of a holy life according to his word. Depending on his all sufficient grace I engage to walk as a christian in the faith and order of the gospel, conscientiously attending the worship of God, in secret, in family, and in public,—upon the sacraments of the New Testament, Baptism and the Lord's supper, and the discipline of his kingdom. I do solemnly covenant to walk with God's people, to watch over

Lowrey v. Territory of Hawaii, 19 Haw. 123.

them, and submit to their Christian watch and care, to let my light shine before men, and to seek the glory of God in promoting their happiness and salvation.

“Having confessed my sins, before this church and made a public profession of my faith in Jesus Christ, and with their consent taken on me the vows of his everlasting covenant, and solemnly engaged to be the Lord’s, and to walk with his people as a Christian, and as a citizen of Zion, I desire moreover to unite fully with this particular church, and have my name enrolled with theirs, and as one of their members to enjoy their privileges, and to engage with them in the service of God our Savior.

“Honolulu, Sandwich Islands.”

The government replied under date of April 27, 1849, accepting the proposals subject to ratification by the legislature and with the following proviso:

“Provided, that in case of the non-fulfilment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions & improvements which may have been made upon the premises, & all rights & privileges connected therewith, to revert to the said Mission, to be held in behalf of the Am. Board of Com. for Foreign Missions, or to pay the sum of \$15,000. Provided also that in case this Government shall find it expedient to divert this establishment to other purposes than those of education it shall be at liberty to do so, on condition that it sustain an institution of like character, and on similar principles in some other place on the Islands or pay the sum of \$15,000 to said Mission, in behalf of the Mission Board in Boston.”

These additional proposals of the government were accepted by the mission under date of April 28, 1849. On May 8 the mission proposed a substitution for the previously presented confession of faith, which was accepted by the government in the following correspondence:

Lowrey v. Territory of Hawaii, 19 Haw. 123.

“Honolulu, May 8th, 1849.

“To his Ex. R. Armstrong
Minister of Public Instruction
of His Hawaiian Majesty.

Sir:—

Being instructed by the American Mission in their General Meeting lately adjourned, we would, as their Comtee. most respectfully present for your consideration, the Confession of Faith within enclosed, as a substitute for the one given with the Articles of agreement, transferring the Mission Sem. at L-luna to the Hawaiian Government.

The reasons for requesting the substitution are, that the previously presented Confession,—although according, in all its specified doctrines, with our belief, & with that also of the churches by whom that Institution has been founded & sustained,—is yet not so distinctive, as to present a barrier to the introduction there of other & deleterious doctrines not specified in sd. Confession. It will admit also of teaching in that Seminary, views entirely at variance with those of this Mission & of the churches sustaining it; such as we feel to be entirely subversive of Evangelical Christianity.

Not doubting but that these reasons will commend themselves to the members of His Majesty's Govt. we beg leave to express, in presenting them, the high consideration with which we remain

Your Ex. most sincere Friends
& obednt. Servants

W. P. Alexander)
C. B. Andrews) Comte.”
S. N. Castle)

“We Believe,

“1st That there is one only living & true God, the creator, preserver, & Governor of the Universe; a Being self-existent, independent, & immutable, infinite in power, wisdom, justice, goodness, mercy & truth.

“2d. That the Scriptures of the Old & New Testaments were given by inspiration of God; that they contain a complete & harmonious system of Divine truth, & are the only perfect rule of Christian faith & practice.

“3d. That God is revealed in the Scriptures as the Father,

Lowrey v. Territory of Hawaii, 19 Haw. 123.

the Son & the Holy Ghost, & that these three are one, & in all Divine attributes, equal.

"4th. That God made all things for himself; that he governs all things according to the counsel of his own will, & that the principles & administration of his government are holy, just & good.

"5th. That our first parents were originally holy; that they fell from that state by transgressing the command of God; & that, in consequence of their apostacy, all their descendants are without holiness, & alienated from God, until their hearts are renewed by Divine Grace.

"6th. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, & death, made an atonement for sin, on account of which pardon & salvation are offered to all who truly repent & believe in him; & that all who will, may come & take of the water of life freely; but, that such is the aversion of man to these terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit.

"7th. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be holy & without blame before him in love; & that they should be saved, not by works of righteousness which they have done, but according to the distinguishing mercy of God, through sanctification of the spirit, & belief of the truth.

"8th. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto salvation.

"9th. That there will be a general resurrection both of the just & of the unjust; & a day of judgment, when all must give account to Christ of all the deeds done in the body: when the impenitent will go away into punishment, & the righteous into life, both of which will be without end.

"10th. That the Lord Jesus Christ has a visible church in this world; that the terms of membership are a credible profession of faith in Christ, & of that holiness which is wrought by the renewing grace of God: that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper & that only they & their households can be admitted to the ordinance of Baptism."

Lowrey v. Territory of Hawaii, 19 Haw. 123.

“Office of Public Instruction
May 24th 1849.

“To Rev. Wm. P. Alexander)
Rev. C. B. Andrews, &)
S. N. Castle Esq.)

“Gentlemen:

Your letter of May 8th, enclosing a confession of faith, which you request may be substituted for the one accompanying your letter of the 25th of April, has been received, & I have only to state that the request is granted, & the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board, & the Legislature of the Islands.

Very respectfully,

Your humble servant

R. Armstrong,

“Minr. of Pub. Instruction.”

The proceedings were ratified by the Hawaiian legislature and in March, 1850, the mission transmitted the following ratification of the prudential committee:

“Honolulu March 1850

“D Sir:

“On behalf of the committee acting for the Mission in the interim of Genl. Meeting I beg leave for the information of His Majesty’s Government to communicate to you the following Resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Missions on the 21st of August 1849, viz.:

“Resolved that the agreement entered into by the Sandwich Islands Mission in April last transferring the Seminary at Lahainaluna in the Sandwich Islands to the Government of said Islands on conditions stated in a letter from the Mission to the Minister of Public Instruction dated Honolulu April 25, 1849, and in a letter from the Minister of Public Instruction dated April 27, 1849, be approved by the Prudential Commit-

Lowrey v. Territory of Hawaii, 19 Haw. 123.

tee & that the Secretary having charge of the foreign correspondence give immediate information of this fact to the Mission.

“Very Respectfully

“Your friend & Servt.

“Saml. N. Castle.

“To His Ex R. Armstrong

“Minister of Public Instruction

“of the Hawn Govt.”

It is worthy of note that the prudential committee do not appear to have been advised of the substitution of the written confession of faith for the printed profession of faith. Not only is this shown by the dates of the correspondence referred to in their resolution, but the original letter transmitting this resolution from Rufus Anderson, secretary of the A. B. C. F. M. dated September 18, 1849, acknowledging receipt of letters in detail (Plaintiffs' Ex. 1), makes no mention of any letter which by date or otherwise refers to the substitution. After the close of the evidence the court requested the attorneys for the plaintiffs to furnish a copy of the report of the American Board for 1849, in which the correspondence before the Board, set out on pages 239 et seq., ends with the letter of April 28, 1849.

While previous to the establishment of the land commission there were no private titles to land in the Hawaiian Islands and while the failure of the American Board to obtain an award for the property in question left the title in the Hawaiian government (Act establishing land commission, Sec. 8 R. L. p. 1163), there can be no doubt that the relinquishment of the claim of the American Board and the transfer of the personal property constituted valid consideration for this agreement. Nor can we sustain the claim of the Territory that its expenditure of money for improvements with the knowledge of the plaintiffs of existing conditions, both prior and subsequent to the alleged breach, constitutes an estoppel. The only serious questions at issue are whether there has been a breach of the contract in question; if so, whether this action is barred by the statute of

Lowrey v. Territory of Hawaii, 19 Haw. 123.

limitations; and whether the deed from the American Board to the plaintiffs gives them the right to maintain this action.

No evidence was offered or attempted to be offered on behalf of the plaintiff to sustain the allegation that religious instruction upon the lines formerly pursued by the mission was continued up to September 1, 1903, or that it ceased to be part of the curriculum on or about that date. In place of proof upon this point the plaintiffs offered the testimony of Sereno E. Bishop as to the course of instruction during his incumbency as instructor and principal at Lahainaluna from 1865 to 1877, and then the testimony of Mr. MacDonald, the present principal, as to the course of instruction after September 1, 1903, leaving the intervening years wholly without offer of proof. As a result of this procedure they claim to have thrown upon the Territory the burden of overcoming the presumption that the state of things testified to by Dr. Bishop continued throughout the period upon which no testimony was offered, or at all events that having shown, as they claim, an alleged breach existing on or about September 1, 1903, the burden of proof was on the government to show that the breach had occurred before that time if it wished to take advantage of the statute of limitations. In further accordance with this theory of the burden of proof the plaintiffs practically refrained from all cross examination of the graduates of Lahainaluna, called by the government, whose attendance covered the period in question, although in each instance the government asked concerning the religious instruction, and at the close of this testimony advanced the further claim that the government had failed to ask the direct question as to whether the particular doctrines enumerated in the confession of faith had been taught.

It would be highly unsatisfactory to have to determine a question of this kind, where ample testimony is available, upon considerations relating to burden of proof and presumptions. We are not driven to a consideration of these questions, how-

Lowrey v. Territory of Hawaii, 19 Haw. 123.

ever, because the documentary and oral evidence finally presented gives a comprehensive view of the entire course of instruction from the foundation of the institution to the present time.

One of the avowed objects of the early founders of the seminary was the education of young men to become ministers, yet there is no evidence from which we can find that at any period the institution was a theological seminary in the sense that it prepared its graduates for immediate service in the ministry. The "Laws of the High School" of June, 1835, extracts from which are attached to the declaration, were presented by the directors to the mission as "a more definite and enlarged plan of operation such as they supposed from actual experiment to be practicable." (Plaintiffs' Ex. K, p. 147.) The curriculum is described as "the course of study to be introduced as soon as practicable." (Plaintiffs' Ex. K, p. 153) In 1842 the general meeting, in response to an animated appeal from the American Board on the subject of theological education, resolved that "it is inexpedient at present to attempt anything in the form of a theological school or seminary for the whole islands; but that it be recommended to the brethren of each island to confer together on this subject, enter upon the work as individuals, or where practicable designate one of their number, to devote such a portion of his time as he and they may deem proper to a class in theology." Minutes general meeting, 1842, p. 29 (Plaintiffs' Ex. M, Defendant's Ex. 35.)

Jarves writing of the seminary in 1843 says: "This institution has already supplied an abundance of teachers well qualified for the common schools; and it is designed eventually to educate the most promising youth to form a native clergy." Jarves, Scenes and Scenery in the Sandwich Islands, p. 177 (Defendant's Ex. 33.) In 1847 the design is still "eventually" to be carried out. Bingham, Sandwich Islands, p. 424 (Plaintiffs' Ex. 22.)

Lowrey v. Territory of Hawaii, 19 Haw. 123.

The curriculum of the school in 1846 is given as follows:

"The branches taught in the school are Sacred Geography, Universal Geography, History, Sacred and Profane, Hawaiian Grammar, Algebra, Geometry, Trigonometry, Navigation, Mensuration, Surveying, Linear Drawing, Sacred Music, and a variety of miscellaneous branches." Report Minister Public Instruction 1846, p. 52, Plaintiffs' Ex. 19, Defendant's Ex. 1.

After the transfer to the government the institution continued to be primarily for the education of teachers (Report Minister Public Instruction 1850, p. 26; Report President Board of Education 1872, p. 4) from the middle classes of the Hawaiian people (Report President Board of Education 1866, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: "A year spent in theological study with a missionary is thought sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, The Hawaiian Islands, p. 189 (Plaintiffs' Ex. 23.)

The curriculum of the seminary underwent little change between the years 1849 and 1877. The following extracts from the reports in evidence are sufficient to indicate the course of study:

"Their studies have been as follows: Algebra, Geometry, Trigonometry, Surveying, Navigation, Natural and Revealed Theology, Natural and Moral Philosophy, Anatomy, Hawaiian Laws, Chronology, Sacred Geography, Sacred History, Geography, Composition, Punctuation and Music."

Report Minister Public Instruction 1852, p. 40.

"The following is the course of study pursued by the several classes:

"Fourth or Freshman Class.

"Arithmetic, Geography, Chirography, Punctuation, English Language, Ancient History, Natural History, Chronology, Bible History, Chronology and Geography of the Bible, Hawaiian History.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

“Third Class.

“Hawaiian Constitution, Bookkeeping, English, Anatomy, Algebra.

“Second Class.

“Geometry, English Language, Political Economy, Church History, Evidences of Christianity, Natural Theology, Moral Philosophy.

“First or Graduating Class.

“Trigonometry, Surveying, Navigation, Natural Philosophy, Optics, Astronomy, English Language, Theology.

“Compositions, debates and declamations are required through the whole course.”

Report President Board of Education 1862, p. 8.

In 1863 the American Board withdrew from active work in the Hawaiian Islands, and the Hawaiian Mission was reorganized as a self supporting institution under the name of Hawaiian Evangelical Association. The American Board continued to maintain, and still maintains, a fiscal agent whose chief duty in later years has been the payment of salaries to such of the original missionaries as are still living.

During the next two years the history of Lahainaluna was twice reviewed in public documents, and these are relied on by the plaintiffs as supporting their construction of the contract.

In 1864 the board of education laid before Attorney General Charles C. Harris copies of the documents relating to the transfer of the seminary. The declaration avers that this was in answer to a proposal to change the form of religious instruction, but there is no evidence of this, the attorney general himself saying, “I scarcely know on what point or points I am required to give an opinion.” He advises the board of education that a deed of conveyance should have been made yet that no one now can dispossess the government if it shall keep the conditions of the transfer. He quotes the conditions and gives his opinion that the original confession of faith as far as it goes does not differ in anything from what is taught in the Roman and Angli-

Lowrey v. Territory of Hawaii, 19 Haw. 123.

can churches by Methodists and probably some others. He then refers to the proposal of a substituted confession of faith, which, judging from the nearness of the date from the 8th of May to the 29th of April, he assumes was before the Prudential Committee in Boston and therefore the one of binding effect. The allegation in the declaration that he "refers to the substitution of the second confession saying that it is a much stronger instrument" is unsupported by the letter. On the contrary the attorney general says that the substituted confession differs from the first in no essential particular except the last article ("last three lines" written in the margin.) These lines relate to the right to partake of the Lord's Supper, and the attorney general argues that these are unessential as articles of the Christian faith. He then concludes, "Should the government not be willing to keep the conditions as far as I have shown them (see p. 8) the property and improvements must be restored to the A. B. C. F. M."

This opinion gives us no material assistance in construing the terms of the transfer nor does the recent opinion of an assistant attorney general also introduced by the plaintiffs throw much additional light. On March 31, 1903, Phillip L. Weaver, assistant attorney general, rendered an opinion to the chairman of the senate committee on public lands. The principal points made are that the condition of the trust as to religious teaching being negative, the government is "not compelled to teach any religious doctrine whatever, and therefore in my opinion cannot be held to be a sectarian institution."

In 1865 a controversy arose over the right of nomination of teachers for the institution. Samuel N. Castle, agent of the A. B. C. F. M. having urged the board of education to fill a vacancy and having submitted a list of names which "would be entirely acceptable to the A. B. C. F. M. in case they should be preferred by his Majesty's government to the nominee already named (Plaintiffs' Ex. 2, April 18, 1865), the board of educa-

Lowrey v. Territory of Hawaii, 19 Haw. 123.

- tion inquired whether Mr. Castle implied that the board had not "full liberty to select the masters in question without reference to any other authorities, and if so to state the nature of the ground on which any such claims to interfere with the internal management of the said school appeared to be founded." (Plaintiffs' Ex. 5, June 9, 1865.) Castle replied at length, giving his views not only upon the question immediately in issue but upon the general construction of the contract. He admitted that literally construed the terms of the conveyance gave no right of nomination and the American Board had no right to interfere until something has been taught in the institution contrary to the confession of faith, but claimed that the instrument was defective in not explicitly recognizing a ratifying or nominating power in the American Board, and that the appointment of any man not acceptable to the A. B. C. F. M. to the post of teacher in the institution would be a violation of the whole spirit of the agreement. (Plaintiffs' Ex. 6, June 13, 1865.)

The board of education replied that it inferred from the letter that the claim might still be advanced that the board had not full liberty to select the masters in question without reference to other authorities and stated that it was of an entirely different opinion. In its view "a suggestion from those representing the founders of the institution is entitled to a respectful and courteous consideration but they desire it to be distinctly understood that a right of nomination does not exist, is not hinted at and was not intended to be reserved on the one side or granted on the other." The board disclaims any desire to defeat the purpose for which the institution was founded "or introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders."

Referring again to the claim of the right of nomination the board "wholly and unequivocally dissent. They are of the opinion that a full compliance with the agreement consists in

Lowrey v. Territory of Hawaii, 19 Haw. 123.

appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, but the acceptability or the contrary of the person appointed to the A. B. C. F. M. forms no part of the contract either in letter or in spirit." The board nevertheless appointed Sereno E. Bishop, the original nominee of Mr. Castle. (Plaintiffs' Ex. 7, June 30, 1865.)

In 1877 occurred a vital change in the management and instruction of the seminary. This arose from the substitution of English for Hawaiian as the medium of instruction. The consequences are foreshadowed in a letter from Dr. Bishop recommending the change as follows:

"To Hon. C. R. Bishop, President of the Board of Education,
"Honolulu.

"Dear Sir:

"In accordance with your request, I have the honor to present my views on the expediency & practicability of adopting the English language as the medium of instruction in Lahainaluna Seminary and on the changes in the curriculum of study which such a change from the Hawaiian would be likely to necessitate.

"It has been apparent to me for some months, that the time had arrived when this change should be made. The greatest objection to it is now in some degree obviated; that it would prevent the mass of the more capable Hawaiian youth from availing themselves of the means of Higher education, which they have hitherto received at Lahainaluna in their own language. The multiplication of English schools for natives has now made it possible for perhaps a majority of Hawaiian lads to acquire such an elementary knowledge of English as would enable them to pursue many elementary studies in that language with profit, and in so doing to qualify themselves for higher studies.

"It seems to be now the fact, that the majority of those Hawaiian parents who are disposed to incur expense for the higher education of their sons, will do so only in schools where they will be likely to acquire a good practical knowledge of English. It has hence resulted, that of late years, our fourth class has numbered, on entering, from 12 to 15, whereas they

Lowrey v. Territory of Hawaii, 19 Haw. 123.

used to be 30 or 40. At the same time the scholars already pursuing the course have for three years past, shown an unusual degree of persistence in remaining, so that our numbers in attendance have not fallen off in the same proportion, we still having 50, in place of 80 a few years ago.

"I have felt a reluctance to propose this change of language, fearing a necessity to omit in consequence, the long-established and highly valued course of instruction, given in this Seminary in certain studies of an abstract nature, which it would only be possible to impart to Hawaiians in their own tongue. These are such as Moral Philosophy, Political Economy, Evidences of Christianity, and other subjects which have held a leading place in our curriculum, and which require a considerable portion of the time of one teacher. Some instruction in a part of these subjects might possibly be provided for without an increase of the corps of instructors but a part of them would probably have to be omitted, on account of the increased labor devolving on the white teachers, in consequence of teaching so many branches in a language strange to their pupils.

"Could the services of an exceptionally able Hawaiian teacher, such as Rev. M. Kuaea, be secured, some of these subjects might profitably be consigned to his instruction, although no Hawaiian possesses the requisite range of thought and reading to give any considerable ability on such topics.

"As to the most of the other studies pursued, I am convinced that they can be taught with success in English to scholars who on entering are already prepared by two or three years of good study of English. This is especially true of all Mathematics in our course, from written arithmetic up to surveying and navigation, in all which the constant repetition of terms and forms of expression immensely facilitates the work.

"The same is true in *Geography*, if books like Cornell's or Mitchell's series are used, where most of the work is in questions of topography, involving the same element of *repetition of forms*.

"*Natural Philosophy* and *Astronomy*, relating wholly to material and concrete objects, can be taught in English, involving, however, much more labor than Mathematics.

"*History*, which occupies a prominent place with us, might be taught by the use of a well-known & excellent Child's His-

.Lowrey v. Territory of Hawaii, 19 Haw. 123.

tory. The *Hawn. Constitution*, being printed in both languages, would be readily taught.

“Physiology, and other branches of Natural Science can be taught by the use of Hooker’s Child’s Book of Nature which is written in simple language.

“It would seem necessary, for the efficient prosecution of some of these studies, that *one* of the teachers should possess a tolerable acquaintance with Hawaiian, in order to explain the sense of terms employed. One teacher, if a man of ability, might find ample success, although ignorant of Hawaiian.

“The labor of instruction will be so largely augmented by the use of a foreign tongue, that it would seem necessary, without adding a third white teacher, to abridge materially the present curriculum. But this abridgment need not, in that case, I think, go so far as to radically change the constituted character of the school, as one for Higher Education. It is also to be borne in mind that for those successfully graduating at Lahainaluna, Oahu College will afford the opportunity of further progress, for which they will then be qualified by their attainments in English.

“Very respectfully yours,

(Signed)

“S. E. BISHOP.”

Letter of S. E. Bishop referred to in minutes of the Board of Education, January 3, 1877 (Plaintiffs’ Ex. 13.)

The proposed change was adopted by the board of education upon motion of E. O. Hall, a member of the board who was fiscal agent of the A. B. C. F. M. (Minutes Board of Education, March 27, 1877. Plaintiffs’ Ex. 13.) It went into effect July 1, 1877. Dr. Bishop resigned and H. R. Hitchcock was appointed in his place. This marks a complete severance of the relations between Lahainaluna and the Hawaiian mission or its successor the Hawaiian Evangelical Association. From this date there is no evidence that those representing the mission in Hawaii ever nominated or were consulted in respect to the personnel of the teachers and the principals from that date to the present have been neither ministers nor missionaries.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

Mr. Bishop became assistant in the North Pacific Missionary Institute which was reorganized the same year under the auspices of the American Board and the Hawaiian Evangelical Association as a training school for Hawaiian pastors and missionaries. (Reports President Board of Education 1880, p. 26; 1882, p. 37; 1894, p. 86, Plaintiffs' Ex. 13.)

The following extracts give the curriculum at Lahainaluna since 1877: .

"The Board have also, in response to the popular demand, reorganized the National Seminary so as to make the English language the chief medium of instruction. The curriculum of study now embraces, besides the elementary branches, Algebra, Geometry, Trigonometry, Mensuration and Surveying, Science of Common Things, Bookkeeping, General History, Natural Philosophy and Physiology; all of which are taught in the English language. A few of the studies embracing subjects of Moral Science, History and Political Economy have been taught during the past year in Hawaiian; but these are hereafter to be omitted or taught only in the medium of English. The course also embraces original English Compositions and Orations, and Lectures on the Science and Practice of School Teaching.

"The Nation looks to Lahainaluna as the nursery from which it is to be supplied with teachers, not only for its Common Schools, but also for its Select and English Schools."

Report President Board of Education 1878, p. 8.

"The course of study occupies four years, and is arranged with a view to give the pupils a good knowledge of English. It embraces instruction in all the Higher Mathematics, in subjects of Natural and Moral Science, History and Political Economy, and also instruction in the principles and practice of teaching."

Report President Board of Education 1880, p. 17.

"The prescribed course of studies and instruction is arranged for four years. The first year, it comprises a thorough review of the branches usually taught in Grammar Schools. During the remaining years, the course is more extended, including Higher Mathematics, subjects of Natural and Moral Science,

Lowrey v. Territory of Hawaii, 19 Haw. 123.

History and Political Economy. Instruction in Music forms a part of the regular exercises of the school. The several classes also have exercises in English Composition and Declamation."

Report President Board of Education 1882, p. 20.

"The Seminary is a part of the public school system in which instruction is provided in branches of study more advanced than those pursued at the other select schools. The regular course of instruction continues for four years; but pupils may be advanced according to their scholarship when they enter, so as to complete it in a shorter time. Besides a review of the usual common school branches the course of study embraces Algebra, Geometry, Trigonometry, Surveying, Bookkeeping, History, Natural Philosophy, Moral Science, Political Economy, and Physiology, English Composition, Music, Military Drill, and instruction in the theory and practice of School Teaching. Annual written examinations constitute a very important feature of the Seminary. The promotion of pupils from class to class is based on the results of these examinations."

Report President Board of Education 1884, p. 21.

"Course of Study.

"There are five classes in the school, representing five years' work, and the following is the course of study pursued:

"E Class—Reading, from 'Hawaii's Young People;' Drawing and Natural Science, Observation Work; Geography, Frye's advanced; Literature, De Garmo's Tales of Troy; Arithmetic, to percentage, Atwood; Agricultural Work.

"D Class—Literature, Cook's Ulysses; History, Andrew's Ten Boys; Physiology, Blaisdell's How to Keep Well; Arithmetic, completed, Atwood; Drawing and Music; Printing.

"C Class—Literature, Black Beauty; History, connected stories from general history; Physics, Shaw's Physics by Experiment; Algebra, to unknown quantities, Wentworth; Drawing and Music; Carpentry and Wood Turning.

"B Class—Literature, Evangeline; History, American, Barnes; Grammar; Geometry, through circles; Drawing and Music; Carpentry and Wood Turning.

"A Class—Literature; History, Hawaiian; Composition; Geometry, complete plane; Drawing and Music; Carpentry and Blacksmithing."

Report Superintendent of Public Instruction 1900, p. 88.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

“Course of Study.

“E Class—Reading from ‘Hawaii’s Young People,’ Baldwin’s ‘Fifty Famous Stories;’ Great Americans for Little Americans; Reproduction of Stories; Letter Writing; Drill in Capitalization, Punctuation, Paragraphing, Phonics, etc. Memory Selections; Prince’s Arithmetic No. IV completed; Geography; Current Events; Physiology, the Human Body and Its Health, by Smith; Music; Mechanical Drawing.

“D Class—Cooke’s Stories of Ulysses; Blaisdell’s Stories from English History; Mother Tongue, Book I; Current Events; Letter Writing; Short Poems Memorized; Arithmetic, Prince’s Book V completed; Frye’s Geography; Smith’s Physiology; Music; Mechanical Drawing.

“C Class—Eggleston’s First American History; Mother Tongue No. I, reviewed and No. II begun; Dole’s Young Citizen; Current Events; Letter Writing; Arithmetic, Prince’s Book VI, completed; Algebra begun; Agriculture, ‘Agriculture for Beginners,’ by Burkett, Stevens and Hill; Frye’s Geography; Bookkeeping and Drawing.

“B Class—Eggleston’s Advanced American History; Guerber’s ‘Roman History’ (given orally, for oral and written reproduction); Current Events; Mother Tongue, No. II; Synopsis of Hawaiian Government; Letter Writing; Poems memorized; Arithmetic, Prince’s Book VII completed; Algebra; Frye’s Geography; Bookkeeping; Agriculture; ‘Agriculture for Beginners,’ by Burkett, Stevens and Hill.

“A Class—Alexander’s Hawaiian History; National Stories; as Jewish Heroes, Cyrus the Great, Pericles, Alexander the Great, Julius Caesar, Charlemagne, Nelson, Napoleon, etc., given for oral and written production; supplementary reading; Current Events; Letter Writing; Memory Selections; Arithmetic, Prince’s Book VIII completed; Wentworth’s ‘First Steps in Algebra,’ reviewed; Geometry, Wentworth’s First Book; Frye’s Geography completed; Bookkeeping; Agriculture. In addition to the text books frequent reference is made to the publications of the Department of Agriculture.”

Report Superintendent of Public Instruction 1906, p. 16.

Under the decision of the United States Supreme Court we are to construe the condition of transfer in the light of the cir-

Lowrey v. Territory of Hawaii, 19 Haw. 123.

cumstances which preceded it and the immediate and long continued practice under it. Confining ourselves for the present to the condition respecting religious instruction reading, "It shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed," the following possible constructions of the language may be considered:

(1) That the condition is purely negative in character and does not require the teaching of any religious doctrine. This construction is precluded by the decision of the United States Supreme Court.

(2) That the contents of the confession of faith should be taught as a formal doctrine or creed. There is no evidence that the parties ever acted upon this interpretation. No evidence has been presented that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. Dr. Bishop, who was in the school from 1865 until 1877, testified that he had never seen it. (Transcript, p. 13.) In fact there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

(3) That religion should be taught and that as taught it should not be contrary to the doctrines mentioned. Thus construed it is obvious that it allows considerable latitude in the amount of religious instruction. If it means that theology shall form part of the curriculum of the school the condition was broken as early as 1877 and any action thereon is long since barred by the statute of limitations applicable to claims against the government. R. L. Sec. 2004. *Hartman v. United States*, 35 Ct. Cl. 106. If, however, the acts and statements of the parties in 1865 are to be relied upon as contemporaneous construction the same must be true of the acts of the parties in 1877 and from thence to the present day. The fact that the

Lowrey v. Territory of Hawaii, 19 Haw. 123.

change from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious. The fact that this change was made upon the recommendation of Dr. Bishop and with the full acquiescence of all concerned from 1877 until 1903 is surely as potent as the actions of the parties during the preceding years. To the present day there has been no protest from the American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board, the terms of which will be more fully considered later.

Unless the condition prescribes the amount and extent of religious instruction it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same. This, as testified to by the graduates and by the present principal, C. A. MacDonald, comprises morning and evening prayer including occasional discussions of passages of the scripture, compulsory attendance at Sunday school with preparation of the International Sunday school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which the pupils are required to discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. In point of time occupied it compares favorably with that prescribed by the "Laws of the High School" of 1835 as attached to the declaration and quoted in 206 U. S. 207. We regard this as a substantial compliance with the condition of transfer.

The question as to whether this constitutes Lahainaluna a sectarian institution within the prohibition of that portion of Sec. 55 of the Organic Act reading, "Nor shall any public

Lowrey v. Territory of Hawaii, 19 Haw. 123.

money be appropriated for the support or benefit of any sectarian, denominational or private school or any school not under the exclusive control of the government" is largely a question of the definition of the word "sectarian." This is defined by the Century dictionary as "Of or pertaining to a sect or sects," and the question in this case would depend upon whether the singular or plural were chosen. The religious teaching at Lahainaluna is not that of any particular sect but would apparently be acceptable to all of the denominations usually known as orthodox or evangelical Christian denominations. Whether this is sectarian would depend substantially as to whether the Young Men's Christian Association, Christian Endeavor and the International Sunday school lessons are sectarian or nonsectarian. We believe a majority of persons belonging to any one of the denominations referred to would regard these as non-sectarian, while from the standpoint of a Roman Catholic or even an Episcopalian they would be regarded as sectarian because including a group of sects. As a matter of practical interpretation it may be noted that when the provision in question was under discussion for adoption as Article 97 of the constitution of 1894, a discussion participated in by W. O. Smith, one of the present plaintiffs, who opposed the article, there was no suggestion made that the contemplated provision would affect Lahainaluna.

"Delegate Carter said he had been at some pains to find out what schools would be affected by this article, and found that there were five. The first was Kawaiahao Seminary. Even if this was closed up, the work would be taken up by the Kamehameha Girls School. The second was the Makawao Seminary. This was one of the best and has done splendid work, and he would be glad to see it under the control of the Board of Education. The third was at Kohala, and could be greatly improved and enlarged if taken in hand by the board. There is no girls' school on Kauai. The Hilo Boarding School for Boys is another that will be affected, as it would lose about \$400, but that is an insignificant amount compared with its expense. The Kauai Industrial School is the last one. It will be much better

Lowrey v. Territory of Hawaii, 19 Haw. 123.

to take Government assistance away from these schools, and he trusted that the report would receive the warm support of the Convention." Convention Proceedings 1894, June 19, Afternoon Session, p. 76.

In any event the question does not appear to be material to the present case, as it can make no difference to the plaintiffs whether the appropriations for the school from time to time were legal or not, while if the adoption of the Constitution of 1894 be regarded in any way as conclusive against the right of the Government to fulfil the conditions of transfer, the claim would be barred by the statute of limitations.

So far as the condition respecting the cultivation of sound literature and solid science is concerned a glance at the curriculum for 1900 and 1906 will show that there is no room for the contention that this condition has been broken. More literature has been taught in recent years than ever before and while the course in mathematics is not quite so extensive as formerly a course which comprises arithmetic, bookkeeping, algebra and geometry cannot be said to fail in instruction in solid science.

Some stress has been laid upon the technical and agricultural instruction now given at Lahainaluna, but technical and agricultural training have been prominent features of the school for over half a century. A few extracts from the reports will illustrate this:

"In the high schools at Lahainaluna, Hilo and Waioli, Kauai, and Kohala, Hawaii, a portion of each day is devoted to labor, and with the most beneficial results. The scholars derive a large portion of their support from their own industry."

Report Minister of Public Instruction 1850, pp. 24, 25.

"One great cause of the firm health of these native youth is their occupation, for at least three hours each day, in the cultivation of the soil, for their own advantage. The institution owns a fine tract of kalo land near by, and from this the pupils derive their food and a large part of their living, by the labor of their own hands."

Lowrey v. Territory of Hawaii, 19 Haw. 123.

Report President Board of Education 1858, p. 12.

"A very important part of the system of education adopted at the Seminary is that of manual labor; important, as it furnishes the means of living to the students, most of whom are poor. At the same time it gives that health and vigor to their physical constitutions so necessary to the student; cultivates habits of industry and economy, and affords some knowledge of the principles and methods of agriculture.

"In this connexion, I am happy to approve very heartily of the suggestion contained in the report of the Principal; in regard to the planting of sugar cane on the lands of the Seminary, and hope the means for carrying out the project will be furnished. Should this be done, the students will be greatly benefited by the addition to their means of support, while the institution will share in some degree in the improvement."

Report President Board of Education 1862, p. 9.

"Whenever the locality and opportunities were favorable, a system of labor among the scholars has been promoted, as contributing not only to physical health, but also to the procuring of school books, slates, etc., for the scholars, and making them interested in the cultivation and adornment of their own schools and school land."

Report President Board of Education 1866, p. 3.

"More attention has been paid to the acquisition of the English language, and to industrial and agricultural pursuits, and a marked improvement both in the scholars and in the lands of the Seminary has been the consequence."

Report President Board of Education 1868, p. 3.

"Manual labor is also an important part of the system of education at the Seminary. It furnishes the pupils the means of living; gives health and vigor, and habits of industry and economy."

Report President Board of Education 1882, p. 20.

"Agricultural labor is also an essential feature of the school. By it the pupils furnish all their table supplies. During the past year a carpenter's shop has been built and fully equipped with benches and tools for the use of pupils. The operations of the shop have been already noticed in this report."

Report President Board of Education 1884, p. 21.

Lowrey v. Territory of Hawaii, 19 Haw. 123.

“At Lahainaluna industrial training is given in agriculture, carpentry, mechanical drawing, printing, etc., and the students raise most of their own food. It is proposed that still more prominence shall be given to agricultural training in that school. For the materials and tools required in these lines of industrial labor a small appropriation will be asked for.”

Report President Board of Education 1896, p. 7.

The emphasis laid on agricultural work in the past few years does not amount to a change in kind but one in degree, apparently prompted by a desire to obtain the federal aid available for agricultural colleges (Report Superintendent Public Instruction 1904, p. 7) an expectation not realized. There has been no change in the official designation of the school. The allegation concerning the name in the declaration appears to have been based upon one reference in the governor's report to the Lahainaluna agricultural school (uncapitalized) apparently overlooking numerous instances in the same and other reports in which the school is referred to under its official title.

While we base our decision upon the consideration of the substantial rights involved, we are also of the opinion that the present plaintiffs are not entitled to maintain this action. They claim as trustees under an indenture dated July 25, 1903, between the American Board of Commissioners for Foreign Missions and F. J. Lowrey, Henry Waterhouse and William O. Smith, trustees, George P. Castle having afterwards been substituted in place of Henry Waterhouse. The indenture in question recites that the “grantor is the owner of certain lands, tenements, hereditaments and the appurtenances thereto belonging, situate in the Hawaiian Islands hereinafter described and referred to, and is desirous of contributing to the support and maintenance of the Board of the Hawaiian Evangelical Association, an Hawaiian eleemosynary corporation organized and established for the corporate purpose of mutual counsel and assistance in the great work of propagating Protestant Christianity, and to enter into common measures for promoting

Lowrey v. Territory of Hawaii, 19 Haw. 123.

knowledge and religion, and for preventing infidelity, error and immorality; and said grantor proposes now to convey the said lands and property, hereinafter particularly described and referred to, in trust for the use, benefit and behoof of the said Board of the Hawaiian Evangelical Association, to the extent and in the manner hereinafter set forth, in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands, and to that end it has been agreed between the parties hereto and said intended beneficiary that these presents shall be executed."

The property conveyed by the instrument is described as "all and singular the lands and real estate situate in said Territory of Hawaii belonging to said grantor, described and particularly referred to in the schedule hereunto annexed, marked 'Schedule A,' reference to which is hereby made and the same made a part hereof, together with all other lands in the possession of or belonging to said grantor or in or to which said grantor has any right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intents and purposes as though a particular description thereof were herein incorporated and included in said Schedule."

The schedule makes no mention of Lahainaluna, and the only contention which would support the claim of the plaintiffs is that a claim to a sum of money which the defendant has the option of paying as an alternative to the conveyance of certain property upon breach of condition is covered by the language quoted. We do not so construe the language. The claim of the plaintiffs in this respect would be stronger if they were claiming a reconveyance of the land as an alternative, but their declaration takes the position that the option has been exercised by the actions of the government in the matter and that the money is absolutely due. The conveyance in question does not

Lowrey v. Territory of Hawaii, 19 Haw. 123.

appear to assign any money claims or demands, whether accruing before or after the conveyance, but only lands in or to which the grantor has any right, title, interest, claim or demand. Still less can it be held to cover a claim not existing at the date of the conveyance, but which according to the allegations of the declaration, accrued thereafter. The general tenor of the declarations of trust supports the conclusion that only real estate was in the contemplation of the parties.

Judgment for the defendant.

D. L. Withington, W. R. Castle and C. H. Olson (Smith & Lewis with them on briefs) for plaintiffs.

M. F. Prosser and C. R. Hemenway, Attorney General, for defendant.

IN THE MATTER OF THE ASSESSMENT OF STAMP
DUTY ON DEEDS TO ROBERT LOVE ESTATE,
LIMITED.

APPEAL FROM TREASURER.

ARGUED JUNE 12, 1908.

DECIDED JULY 1, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

INTERNAL REVENUE—*stamp duty—conveyance in consideration of corporate shares.*

A conveyance from certain persons to a corporation organized by themselves in consideration of shares of stock of the corporation is chargeable with stamp duty under R. L. Sec. 1315.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decision of the Treasurer assessing stamp duty on three conveyances to Robert Love Estate, Limited.

In re Robert Love Estate, 19 Haw. 154.

The grantors in the first deed are Alice Love Hoogs, William A. Love, James H. Love, Lily Love Cooke, Walter C. Love and Stella Love Patterson, the heirs of Robert Love, deceased, the consideration being "one dollar and the delivery of an equal portion of the shares of the Robert Love Estate, Limited." The Robert Love Estate, Limited, was incorporated to take over the property and conduct the business of Robert Love, deceased, theretofore carried on by his widow and children. The treasurer assessed a stamp duty of \$266 on the deed, being \$1 on the money consideration named and \$265 on the shares mentioned. It is conceded that the shares were properly valued. The appellants claim that the stamp duty should be \$1.

If this deed is required to be stamped at all in addition to the \$1 on the money consideration, it is under Sec. 1315 of the Revised Laws which provides that "When the consideration for any conveyance or other transfer of property consists of goods or lands, the duty shall be calculated upon the market value of such goods or lands, to be ascertained in such manner as the treasurer may direct." The question is whether shares in a corporation are "goods."

Shares of stock in a corporation are by our statute personal property. R. L. Sec. 2553.

The word "goods" is one of large signification and has an extensive meaning, particularly so when, as in the statute referred to, it is contrasted with "lands."

"The term 'goods' when used in contradistinction to 'real estate' would doubtless include all kinds of personal property, and even bills, notes, certificates of stock, etc." *Curtis v. Phillips*, 5 Mich. 112, 113.

In the United States, though not in England, it is generally held that shares of stock in a corporation are within the meaning of "goods, wares and merchandise" in the statute of frauds. 20 Cyc. 244. The argument that the statute of frauds by necessary implication applies only to goods of which part may be

In re Robert Love Estate, 19 Haw. 154.

delivered was not considered sound by Chief Justice Shaw in *Tisdale v. Harris*, 20 Pick. 9. An animal is not susceptible of part delivery, and yet undoubtedly the sale of a horse by parol is within the statute. But, however it may be with regard to "goods, wares and merchandise" in the statute of frauds, we think that under the broader expression in our stamp statute shares of stock are included in "goods." No reason appears from the face of the statute why conveyances in which the consideration is one kind of personal property should be chargeable with stamp duty while exempt from stamp duty if the consideration is another kind of personal property.

We cannot sustain the contention of appellants that the case of *In re Macfarlane*, 11 Haw. 179, settled the matter in their favor. All that was decided there on the point in question, if anything, was that a consideration of "trust and confidence" was not goods or lands, and consequently did not affect the amount of stamp duty in that case.

We have not overlooked the fact that this statute must be strictly construed, as held in *Kapena v. Bishop*, 3 Haw. 793, and *Valkenberg v. Treasurer*, 14 Haw. 182.

The case of *Knight v. Barber*, 16 M. & W. 66, held that a contract for the sale of railway scrip was not a contract for the sale of goods within the English stamp act. The expression in that statute was "goods, wares or merchandise," however, and not, as in ours, "goods or lands."

It is also contended by appellants that this instrument is not liable to stamp duty because there has been no sale and no new property created, but simply a transfer of ownership from persons as individuals to themselves as a corporation. This contention is immaterial, as the instrument is liable to duty under the statute as a conveyance of property whether there has been a technical sale or not. A similar transaction, however, in *John Foster & Sons v. Commissioners of Inland Reve-*

In re Robert Love Estate, 19 Haw. 154.

nue, (1894) 1 Q. B. 516, where the matter was fully discussed, was held to be a sale.

The next instrument is a deed from Fanny Love, the widow, to the Robert Love Estate, Limited, the consideration being one dollar and an agreement on the part of the grantee to pay the grantor for life one-third of its net income. This was held by the treasurer to require a stamp duty of \$2, \$1 on the money consideration and \$1 on the executory agreement. This was correct. *Minister of Finance v. Castle*, 8 Haw. 105.

The third instrument is a conveyance from the children and widow of Robert Love to the Robert Love Estate, Limited, of the "property, business, good-will, accounts, choses in action, and every other form of property of the bakery carried on by said estate * * * known as 'Love's Bakery,'" the consideration being "one dollar and the issue of an equal number of shares of the Robert Love Estate, Limited." On this instrument the treasurer assessed a stamp duty of \$7, being \$1 on the money consideration and \$6 on the stock consideration. This is covered by the ruling as to the first instrument.

The decision of the treasurer is affirmed.

D. L. Withington (*Castle & Withington* on the brief,) for appellants.

W. L. Whitney, Deputy Attorney General, (*C. R. Hemenway*, Attorney General, also on the brief,) for the treasurer.

TERRITORY OF HAWAII *v.* MAGA AND SEYO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 17, 1908.

DECIDED JULY 1, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

NEW TRIAL—*transcription of stenographer's notes.*

A new trial is not a matter of right when the stenographer

Territory v. Maga, 19 Haw. 157.

fails to file his transcribed notes within the time specified in R. L. Sec. 1800.

ASSAULT AND BATTERY—*dangerous weapon*.

An assault with a sheathed sword cane is an assault with a weapon obviously and imminently dangerous to life.

OPINION OF THE COURT BY HARTWELL, C.J.

The defendants were convicted upon an indictment charging an assault upon one Henry Strange with a weapon obviously and imminently dangerous to life, to wit, a sword cane in the hand of the defendant Maga, with which he cut, stabbed and wounded the said Strange, the defendant Seyo being charged as present aiding, inciting, encouraging and abetting the said Maga in the assault, and both defendants, as charged, thereby having committed the crime of assault and battery with a weapon, etc.

The defendants excepted to the denial of their motion for a new trial which was based on several grounds, of which their counsel in this court relies upon only two, namely, that there was no evidence to sustain the premises charged against the defendant Seyo and because the court did not reduce to writing and read its charge to the jury nor file a manuscript of the charge signed by it, the defendants not having filed their written consent that the jury be charged orally; and because the stenographer did not within one week nor at any time since file his certified notes of the charge.

The exceptions cannot be sustained. The evidence shows that each of the defendants took part in the assault although only one of them struck the complaining witness with the sword drawn from the cane. The character of the sword cane as a weapon obviously and imminently dangerous to life (R. L. Sec. 2913) is not altered by the fact that it remained sheathed and was used as a club while the defendant Seyo was present.

The statute, Sec. 1800 R. L., makes it the duty of the stenographer to transcribe his notes of the judge's charge within

Territory v. Maga, 19 Haw. 157.

a week and to file the same duly certified, and Sec. 1799 makes it the duty of the court, except as provided in Sec. 1800, namely, when an official stenographer is present and takes notes of the trial and proceedings, to reduce to writing and read its charge. It is the violation of the duty of the court under Sec. 1799 that gives the defendants the right to a new trial, not the violation of duty by the stenographer under Sec. 1800. In the present case it appears by the file marks that the stenographer's certified notes were filed October 11, 1907, so that the statement in the motion for new trial filed October 12, that the stenographer had not at any time since the trial filed his certified notes, is not supported by the record, and, as counsel informs us, was made inadvertently.

Exceptions overruled.

J. W. Cathcart, County Attorney of Oahu, for the Territory.

A. S. Humphreys for defendants.

CATALINO MEJEA v. L. M. WHITEHOUSE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 15, 1908.

DECIDED JULY 6, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

MASTER AND SERVANT—*fellow servant.*

The foreman in charge of a gang excavating an earth bank is a fellow servant of the laborers and the employer is not responsible for injury to a laborer resulting from his negligence.

OPINION OF THE COURT BY BALLOU, J.

Defendant was a contractor engaged in building the Nuuanu dam under contract with the Territory. Plaintiff was a laborer engaged in pick and shovel work and at the time of the injury

Mejea v. Whitehouse, 19 Haw. 159.

which gave rise to this action was working in a gang under James Howatt, who was assistant government engineer representing the Territory in the inspection of the work. It is not clear from the evidence how Howatt came to be temporarily in charge of the gang of workmen. In excavating a perpendicular bank of earth plaintiff was directed by the foreman to take the earth from the bottom of the bank and had been ordered to hurry up. While working in accordance with these directions the bank caved in and fell upon him rendering him unconscious for a time, breaking his thigh and causing other injuries. He brought this action for damages against the defendant and at the close of his case was nonsuited.

The negligence of defendant alleged in the declaration is in not having removed or properly supported the overhanging bank. The obligation of the employer to provide a safe place to work in does not, however, include places made dangerous by the progress of the work. *Armour v. Hahn*, 111 U. S. 313. In the present case the bank was originally perpendicular and became dangerous through the method of removal adopted under direction of the foreman, and the plaintiff in this court relies chiefly upon the foreman's negligence in directing the work to be done in this particular manner.

Assuming that Howatt was for the time being the agent of the defendant, and that the risk assumed by the plaintiff was not so apparent as to preclude his recovery, the testimony still presents no ground for recovery against the defendant. The common law rule is well established that a servant injured by the carelessness or negligence of a fellow servant has no remedy against the common employer. *Farwell v. Boston & Worcester Railroad*, 4 Met. 49. In the majority of American jurisdictions it is also well established that it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff. *Holden v. Fitchburg Railroad Co.*, 129 Mass. 268. The

Mejea v. Whitehouse, 19 Haw. 159.

contrary doctrine, known as the superior servant limitation, was first introduced in the case of *Little Miami Railroad Co. v. Stevens*, 20 Oh. 416, and has been adopted in a number of states, but whatever may be its advantages in mitigating the strictness of the common law rule we cannot adopt it in face of the authoritative decisions of the United States Supreme Court by which, in the absence of Hawaiian judicial precedent, we are bound. In *Baltimore and Ohio Railroad v. Baugh*, 149 U. S. 368, and *New England Railroad Co. v. Conroy*, 175 U. S. 323, the authorities are reviewed and the confusing case of *Chicago, Milwaukee & St. Paul Railroad v. Ross*, 112 U. S. 377, is finally overruled. Under the principle announced in the decisions of the Supreme Court the foreman of a gang, directing its work, does not stand in the position of a vice-principal for whose negligence the employer is responsible. *Central Railroad Co. v. Keegan*, 160 U. S. 259; *Northern Pacific Railroad Co. v. Peterson*, 162 U. S. 346.

It is true that the defendant in his contract with the government agreed that he should "provide such precautions as may be necessary for the prevention of accidents to life or property and shall assume the responsibility of all damages or costs resulting therefrom." But we cannot construe this as a contract of insurance for the benefit of the employees but merely the assumption of responsibility as between the defendant and the Territory, inserted out of abundant caution, notwithstanding the nonliability of the Territory.

Whatever may be the hardship of the law which throws upon the laborer the risks of his employment and of the negligent acts of his fellow servants, the courts, in the absence of legislation, can afford no relief in cases like the present.

Exceptions overruled.

T. M. Harrison for plaintiff.

C. F. Clemons (*Thompson & Clemons* on the brief) for defendant.

Ferreira v. Kamo, 19 Haw. 162.

LUCIO FERREIRA *v.* KAMO; PAAUHAU SUGAR
PLANTATION CO., GARNISHEE.

ERROR TO DISTRICT MAGISTRATE OF HAMAKUA, HAWAII.

ARGUED JULY 13, 1908.

DECIDED JULY 14, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

This is a motion by the garnishee, the plaintiff in error, to have the record amended by eliminating therefrom the statement that it appeared by one Makekau as attorney, and by adding to it certain documents referred to during the trial. In response to the order in the writ to send up the record to this court the district magistrate certified that everything had already been sent up pursuant to a writ of error and an appeal previously issued and taken. *Per curiam*. Under all the circumstances, without passing on the motion for the present, it is deemed advisable that the record now in this court, together with a copy of the motion, be forwarded to the district magistrate in order that he may amend and correct it, if necessary to make it conform to the true state of facts, and then return it to this court.

TERRITORY OF HAWAII *v.* ANTONE LUCAS.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JULY 13, 1908.

DECIDED JULY 17, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

PROSECUTING ATTORNEYS.

A deputy county attorney may appear for the Territory in a criminal case.

OPINION OF THE COURT BY WILDER, J.

Defendant, having been convicted of violating Section 1068. of the Revised Laws, brings up a bill of exceptions in which the

Territory v. Lucas, 19 Haw. 162.

only question raised is the right of a deputy county attorney to appear for the Territory in a criminal case.

We find no merit in the exceptions.

Section 90 of the County Act, S. L. 1905, Act 39, provides that the county attorney or his deputy shall "attend the circuit court in and for said county and conduct on behalf of the people all prosecutions therein for offenses against the laws of the Territory of Hawaii." Defendant contends that it is uncertain whether the "people" referred to mean the people of the Territory or of the county, but that in any event the Territory is not meant. This court, however, in *County of Oahu v. Whitney*, 17 Haw. 174, 187, has already construed the phrase "on behalf of the people" to mean "on behalf of the Territory."

Exceptions overruled.

C. R. Hemenway, Attorney General, for the Territory.

Carl S. Smith for defendant.

IN THE MATTER OF THE ESTATE OF DAVID
KAMAIIPIALII, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED JULY 13, 1908.

DECIDED JULY 23, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EXECUTORS AND ADMINISTRATORS—*unnecessary legal expenses.*

Estates of decedents should not be subjected to unnecessary legal expenses, and an attempted sale of the real estate of minors to pay unnecessary fees is expressly disapproved.

EXECUTORS AND ADMINISTRATORS—*sale of real estate.*

An order for the sale of real estate to pay debts is properly vacated, before confirmation of the sale, when it appears that it was made before the time for filing claims had expired, with no

Estate of Kamaipiialii, 19 Haw. 163.

showing that the personalty had proved insufficient, upon insufficient jurisdictional allegations, and with no notice to the heirs.

OPINION OF THE COURT BY BALLOU, J.

David Kamaipiialii having died intestate his widow petitioned for letters of administration to be granted to E. K. Simmons, alleging that the estate of deceased consisted of real estate at Weloka valued at \$1500. The heirs of the deceased named in the petition were the widow, two children aged four years, and one aged nine months. Administration was granted accordingly, but the administrator named failed to furnish bonds and subsequently Joseph S. Ferry, the attorney for the widow on the original petition, moved in his own behalf to vacate the order and appoint G. N. Kaonohiula, a brother of the deceased, the widow having died in the mean time. Kaonohiula, having obtained letters of administration, filed an inventory showing real estate valued at \$1500 and subsequently a supplementary inventory showing personal estate consisting of one bay mare, old furniture, etc., valued at \$81.50. The appraiser appointed by the probate judge verified the valuation of the personal property and appraised the real estate at \$1675.

Thereafter the administrator petitioned for leave to sell real estate for the purpose of paying the debts outstanding against the deceased amounting to \$36, the "debts, expenses and charges of the administration already accrued" amounting to \$102.50, and the "debts, expenses and charges of administration that will or may accrue" estimated at \$125, a total of \$263.50. It will be noted that the amount of personal estate was more than sufficient to pay the debts of the deceased which had been allowed at that time and that the only reason for selling the real estate was for paying the expenses of administration.

An order was issued empowering the administrator to sell two parcels of the real estate "for the purpose of paying the debts, claims and charges against said estate." Both parcels

Estate of Kamaipihali, 19 Haw. 163.

were accordingly sold, one for \$350 and the other for \$255, although the proceeds of either would have been sufficient to satisfy the claims upon which the order was based. A return of sale and a petition for confirmation having been filed one of the purchasers moved for leave to appear in opposition to confirmation apparently on the ground, as shown in subsequent affidavits, that he had been misinformed as to the rent due upon the parcel, it having been actually paid for some time in advance. His motion was apparently denied. His attorney, Carl S. Smith, was appointed by the probate judge first as *amicus curiae* and afterwards as guardian ad litem of the minors. In the latter capacity he protested against the confirmation of the sale on the grounds that the minors had not been represented in any of the proceedings; that the petition for sale did not set forth sufficient facts, and that insufficient evidence was offered in support of it; that the order did not set forth a proper description of the real estate nor the particulars of sale, nor did it provide that the administrator should sell only sufficient real estate to pay the debts of the deceased; that the notices given by the administrator were insufficient in description of the property; that the prices obtained for the land were less than the real value, and that the administrator acted improvidently and unlawfully in selling both pieces when either was sufficient to pay all debts, and that one of the purchasers had been misled by the attorney for the administrator in regard to the rent to accrue on his parcel. The administrator replied, and introduced oral evidence to the effect that beside the doctor's bill of \$36 named in the petition for sale a bill for \$47 had subsequently been presented and allowed by the administrator, bringing the total debts above the appraised value of the personalty. The probate judge denied the petition for confirmation of sale and vacated the order of sale on the ground that the minor heirs of the deceased were not served with notice of the petition and were not represented nor did they ap-

Estate of Kamaipilalii, 19 Haw. 163.

pear in the proceedings. The administrator noted an appeal from this order.

We are unable to escape the conclusion that the chief object of the administration proceedings in this estate has been the accumulation of attorneys' fees. When Kamaipilalii died he left to his infant children, subject to his widow's dower, an unencumbered homestead and two pieces of income producing real estate. The widow sought legal advice apparently with regard to the collection of rents from the realty. The decedent's debts were small in amount and at that time no bills had been presented to the widow. The doctor's bill of \$36 was not presented until after a suggestion by the attorney. No debts are shown to have been due to the decedent or to have been collected by the administrator. Advice to the widow under these circumstances that her interests demanded an administration of the estate at an initial cost of \$50 for filing the petition was advice in the interest of the attorney and not of his client. The subsequent action of the attorney in making this charge as the basis for appearing on his own behalf, at an additional cost of \$30, to petition for the appointment of another administrator in the place of one unable to qualify, is also open to criticism. The attempted sale of the minors' real estate for the purpose of paying these and other anticipated fees was the culmination of a course of conduct of which we must express our unqualified disapproval.

Upon all possible occasions this court has endeavored to give notice that it will not tolerate the practice of treating estates of deceased persons as fair game for the incurring of unnecessary or excessive legal expenditures. *Notley v. Brown*, 16 Haw. 575, 579. Few probate cases, however, reach this court and the responsibility must rest on the circuit judges for the conscientious administration of estates. In the present case as soon as a contest arose the circuit judge seems to have done what was possible to straighten out the state of affairs then existing, but it seems probable that if the matter had remained uncontested the

Estate of Kamaipihali, 19 Haw. 163.

little heritage of these infant Hawaiians would have been wasted under the guise of legal proceedings.

The proceedings for the sale of real estate are so full of error that the order vacating the previous order of sale was the only possible order to have entered. In the first place no petition for the sale of real estate should have been entertained until the six months' period in which creditors might present their claims had elapsed. It is only when all the claims against the estate are before the court that the probate judge can make an intelligent order concerning the amount of real estate to be sold. The contrary course may result, as here, in the administrator selling real estate to pay claims presented after the petition, which have never been scrutinized by the court. If an estate should unexpectedly prove insolvent the sale of real estate for the payment of claims first presented would result in a preference to those creditors.

In the second place there was no showing at any time that the personal estate had proved to be insufficient for the purpose of paying debts within R. L. Sec. 1855. No attempt had been made to pay debts from the personalty and it appears to have been assumed for jurisdictional purposes that the personalty would sell exactly at its appraised value, which is by no means necessarily the case.

In the third place the allegations in the petition are so manifestly inadequate to confer jurisdiction under R. L. Sec. 1855 that it is difficult to see how they passed the scrutiny of the circuit judge. Under our statute real estate cannot be sold to pay expenses of administration but only to pay the debts of decedents. The petition on its face alleges the personalty to be worth \$81.50 and the debts \$36. The bill presented subsequently on which the administrator relies cannot cure the original lack of jurisdiction, which in all cases depends upon the allegations and not on facts which may exist outside of the record. *Vanfleet, Collateral Attack, Sec. 60.*

Estate of Kamaipihiali, 19 Haw. 163.

In the fourth place, as ruled by the circuit judge in vacating the order, the fact that the minor heirs of the decedent were not given notice nor represented at the hearing of the petition for sale is in itself a sufficient ground for vacating the order of sale. These children are the owners of the real estate and their property cannot be ordered to be sold upon the allegations of a third party without notice to them either actual or constructive. 2 Woerner, Administration, Sec. 466. The auctioneer's notices of the proposed sale, published after the order of sale, cannot cure the defect of lack of legal notice before the order was made.

The circuit judge left the question of costs in abeyance until the final determination of the case, so we make no order concerning them, but suggest that the final allowance of any costs or fees out of this estate should be subject to the most rigid scrutiny and to a strict showing of good faith. In the view which we have taken concerning the attempted sale of real estate the costs in that connection can in no event be charged against the estate.

The order appealed from is affirmed.

Joseph S. Ferry for administrator.

Carl S. Smith, guardian ad litem.

FRANK ROBELLO *v.* THE COUNTY OF MAUI.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

SUBMITTED JULY 23, 1908.

DECIDED JULY 25, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

HIGHWAYS—*effect of lease.*

The leasing of public land under a right of purchase lease does not extinguish a highway existing across it, particularly when

Robello v. County of Maui, 19 Haw. 168.

the highway is marked as an "old road" upon the government map referred to in the lease.

HIGHWAYS—*method of closing.*

A public highway can be closed only by the method prescribed by statute, and no representations by public officers would justify a land owner in closing it by fencing.

OPINION OF THE COURT BY BALLOU, J.

The plaintiff is the holder of a right of purchase lease of land described therein as "lot No. 6 on the government map of the Omaopio lots dated July 9, 1906, and is situated at Omaopio, Kula, District of Makawao, Island of Maui, containing an area of 51.5 acres and is classed as pastoral-agricultural land." The government map referred to shows a "new 50' road" running along a portion of the boundary of lot 6 and an "old road" marked in dashes extending through lot 6. There is some conflict of testimony as to how much of the old road thus described is now passable, it being claimed on behalf of the plaintiff that it has been abandoned at one spot, at least by wheeled vehicles, on account of a washout. After several months' occupation of the lot, plaintiff, claiming that he was obliged to fence under the terms of his lease, fenced in the ends of the old road, at the same time clearing the cactus along a portion of the line of the "new road," upon which no construction work has been done either by the Territory or by the county. The defendant, acting by its road supervisor, broke down the fences which obstructed the old road whereupon the plaintiff repaired them and obtained a permanent injunction against any further interference. From the decree granting this injunction defendant appealed.

R. L. Sec. 586 provides, "All public highways once established shall continue until abandoned by due process of law." The only statutory provisions for closing highways are Sec. 9 of the County Act (S. L. 1905, Act 39) and R. L. Chap. 52, and no steps have been taken under either statute in the present in-

Robello v. County of Maui, 19 Haw. 168.

stance. It is beyond question that the commissioner of public lands cannot by leasing or selling land with no express reservation extinguish the easement of the public in a highway, nor is it apparent that he assumed to do so in the present instance. The plaintiff took his lease with full knowledge of the existing highway, not only by reference thereto on the map but by actual knowledge of conditions on the ground; the misunderstanding, if any, being not as to existing conditions but as to what was to be done in the future. The sub agent of public lands told the applicants for these homestead leases that until the new road was built the old road was to be left open, from which the plaintiff may have assumed that either the Territory or the county would proceed in a reasonable time to construct the new road as shown on the map, and that the easement over the old road would then be extinguished. However this may be and whatever may be the reason for the failure to construct the proposed new road, the plaintiff was not authorized to take the law into his own hands and exclude the public from a recognized and existing highway. No injunction should have been granted which restrained the defendant from keeping open the public highway. If the destruction of the fences was in excess of what was requisite for this end he should have been left to his remedy at law.

In view of the result we have reached it is unnecessary to decide the reserved question as to liability of the county for costs, which was based upon the assumption that the county was the losing party.

The decree appealed from is reversed.

J. M. Vivas and *A. G. Correa* for plaintiff.

D. H. Case and *W. F. Crockett* for defendant.

Emmeluth v. Board of Supervisors, 19 Haw. 171.

JOHN EMMELUTH *v.* THE BOARD OF SUPERVISORS
OF THE COUNTY OF OAHU.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 31, 1908.

DECIDED SEPTEMBER 3 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

MANDAMUS—*right of citizen and taxpayer.*

The right of a citizen and taxpayer to mandamus against public officers acting under a statute alleged to be void, based upon an anticipatory refusal, is not passed on in view of waiver of the point by defendants and the sustaining of a demurrer on other grounds.

MUNICIPAL CORPORATIONS—*creation in Hawaii.*

Sec. 56 of the Organic Act authorizes the creation of county and city municipalities by special act, superseding, in respect to Hawaii, the general prohibition of act of July 30, 1886, ch. 818. The provisions in Sec. 55 prohibiting the granting of private charters and special franchises do not apply to municipal corporations.

CONSTITUTIONAL LAW—*statute void in part.*

The qualifications for voters under the Municipal Act (S. L. 1907, Act 118) being in conflict with those defined by the Organic Act may be disregarded without impairing the validity of the remainder of the act.

OPINION OF THE COURT BY HARTWELL, C.J.

The petitioner, as a citizen of the United States and the Territory, and of the County of Oahu, a taxpayer and elector in the Territory and County, filed a petition before the circuit judge for a writ of mandamus directed to the board of supervisors of the County of Oahu commanding them forthwith to proceed and issue a proclamation concerning a county election for the County of Oahu, and to transmit copies of the same to the several boards of inspectors throughout the County of Oahu and to cause the proclamation to be posted in the manner required by law and to do all acts and things required of them under and by

Emmeluth v. Board of Supervisors, 19 Haw. 171.

virtue of an act creating counties within the Territory of Hawaii, and providing for the government thereof passed April 14, 1905, setting forth in his petition that the board of supervisors had neglected and refused to issue a proclamation concerning county elections and to post the proclamation in the manner required by Sec. 36 of the act, and that they declined and refused at any time to issue the proclamation, and as the petitioner is informed and believes and so alleges will not issue it at least sixty days before the general election or at any other time as by the act required, the board of supervisors claiming that the act is repealed by an act entitled "An Act Incorporating the City and County of Honolulu," approved April 30, 1907, whereas the petition as amended alleges that this later act is unconstitutional and void, being in conflict with the provisions of an act of Congress entitled "An Act to prohibit the passage of local and special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes," approved July 30, 1886, 24 Stat. at Large 170, and also in conflict with the Organic Act of the Territory, as an attempt to grant to a corporation special and exclusive privileges and immunities without approval of Congress, and that it requires different qualifications for electors under the act than are provided for in the Organic Act, and disqualifies and disfranchises a large portion of the qualified electors of the Territory and County; that the later act is also unconstitutional in that there are numerous private agricultural corporations within the boundaries of said municipal corporation not subject to control on the part of the Territory except in the exercise of police power, their charters being contracts within the meaning of the contract clause of the constitution, and that the act is void for the further reason that municipal taxes may be imposed on lands strictly rural in character and therefore not capable of receiving benefits and advantages usually received from municipal organizations, and also because the boundaries of the municipal

Emmeluth v. Board of Supervisors, 19 Haw. 171.

corporation established by the act are inaccurate, indefinite and uncertain.

The defendants demurred to the petition on the ground that it does not state facts sufficient to entitle the petitioner to a writ of mandamus as prayed for or to any relief whatsoever.

The circuit judge reserved for the consideration of this court the following questions arising under the petition and demurrer, for that purpose reporting the same to this court, namely:

1. Does the petition for a writ of mandamus as filed in said proceeding state facts sufficient to entitle the petitioner John Emmeluth to a writ of mandamus as prayed for, or to any relief whatsoever?

2. Has the Act of the Legislature of the Territory of Hawaii, entitled "An Act creating Counties within the Territory of Hawaii and providing a government for the same" been and now is repealed by an Act of the Legislature of the Territory of Hawaii, entitled "An Act Incorporating the City and County of Honolulu" approved April 30th, A. D. 1907, and is the said act entitled "An Act Creating Counties within the Territory of Hawaii and providing a Government for the same" void and of no effect and not binding upon the said respondents in any manner or form?

3. Is the said Act of the Legislature of the Territory of Hawaii, entitled "An Act Incorporating the City and County of Honolulu" approved April 30th, A. D. 1907, unconstitutional and void and of no effect, the same being in conflict with and opposition to an Act of Congress of the United States of America, entitled "An Act to Provide a Government for the Territory of Hawaii," inasmuch as it is

(1) An attempt on the part of the Legislature of the Territory of Hawaii to grant to a corporation special and exclusive privileges and immunities without the approval of Congress.

(2) That it requires other and different qualifications for the electors under said Act than are prescribed and provided for

Emmeluth v. Board of Supervisors, 19 Haw. 171.

in said Act of Congress—and disqualifies and disfranchises a large portion of the duly qualified electors of said Territory and said County of Oahu.

4. Is the said Act unconstitutional in that there are numerous private agricultural corporations embraced within the boundaries of said municipal corporation, not subject to control on the part of the Territory, except in the exercise of the police power, their charters being contracts within the meaning of the contract clause of the federal constitution which the States and Territories are prohibited from impairing?

5. Is the said Act void for inasmuch as,

(1) That municipal taxes may be imposed on lands strictly rural in character and therefore not capable of receiving the benefits or advantages usually derived from municipal organizations?

(2) That the boundaries of said Municipal Corporation sought to be established by said Act are inaccurate, indefinite and uncertain.

6. Should the Writ of Mandamus be issued as prayed for?

The demurrer does not specifically set up, the defendants say it was not intended to set up, the plaintiff's incapacity to bring the suit. If the objection had been raised he might have amended by averring an impending unauthorized expenditure of public money, thus bringing his case within the rule in *Castle v. Secretary of the Territory*, 16 Haw. 769, 774. We are not inclined to hold that a private citizen who does not claim that his property rights are in danger of being injuriously affected can obtain an adjudication that a statute is unconstitutional, since as far as political questions are concerned he does not represent the public as in case of unauthorized expenditures. Our cases have not gone to that extent, and we are not disposed to extend their authority. See *Territory v. Miguel*, 18 Haw. 402, 404, in which it was held that one whose rights were not affected by portions of a law regulating sales of intoxicating liquor claimed by him

Emmeluth v. Board of Supervisors, 19 Haw. 171.

to be unconstitutional was not entitled to be heard upon the question. Under the circumstances, and especially as there are other sufficient grounds for sustaining the demurrer, we do not pass upon the plaintiff's right.

Another question not raised by the pleadings but argued by counsel who by consent of court appeared against the petition, is whether the Territory ought to have been made a party in order that the attorney general should represent the interests of the public. The statute, Sec. 2104 R. L., prescribes that the writ "may be directed to public officers to compel them to fulfil any of the duties attached to their office or which may be legally required of them." The county attorney, who appeared for the supervisors, is "a deputy of the attorney general of the Territory" (Sec. 95 County Act), as well as "legal adviser of the board of supervisors" (Sec. 93, *Ib.*) There is no reason why the attorney general should not have been heard without the formality of making the Territory a party.

It is further claimed by the counsel that the petition is premature, since for all that appears the defendants may yet proceed under the County Act. It is true that they would be at liberty to change their purpose, they might be advised to do so. *Mandamus*, it is said, "is never granted in anticipation of an omission of duty, but only after an actual default." *Ex parte Cutting*, 94 U. S. 20. There is no occasion, however, to rule upon this objection or to say whether a refusal made in advance of the time for performing the alleged duty would be a waiver of the objection.

The principal question in the case, although not expressly reserved, is whether the act of July 30, 1886, ch. 818, 24 Stat. at Large 170, is in this case applicable to Hawaii in declaring "that the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say," specifying after numerous other instances, such as granting divorces,

Emmeluth v. Board of Supervisors, 19 Haw. 171.

changing names of persons or places, laying out, opening or altering roads or highways, regulating county or township affairs, practice in courts of justice, jurisdiction of duties of justices of the peace, police, magistrates and constables, providing for management of common schools, "incorporating cities, towns or villages, or changing or amending the charter of any city, town or village," or "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever," and providing "in all other cases where a general law can be made applicable no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof."

Our Organic Act, Sec. 55, also provides that "the legislature shall not grant to any corporation, association or individual any special or exclusive privilege, immunity or franchise without the approval of Congress nor shall it grant private charters, but it may by a general act permit persons to associate themselves together as bodies corporate." Section 1889, U. S. Rev. Stats., enacts that "legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate." Congress has declared that these words in Sec. 1889 "shall not be construed as prohibiting the legislative assemblies of the several territories of the United States from creating towns, cities or other municipal corporations, and providing for the government of the same and conferring upon them the corporate powers and privileges necessary to their local administration by either general or special acts." Act June 8, 1878, ch. 168, 20 Stat. at Large 101.

The provision above cited from Sec. 55, Organic Act, refers to corporations other than county, town and city municipalities which the act, Sec. 56, expressly authorized the legislature to create. The authority for creating such municipalities is not limited by requiring that they shall not be created by special

Emmeluth v. Board of Supervisors, 19 Haw. 171.

law, which was a method "in general use in this country during the last century, and indeed is quite commonly employed at present. In states even where the constitution forbids the legislature to grant any special charter of incorporation, it has been ruled that such a constitutional inhibition does not relate to public corporations." *Ingersoll Pub. Corp.* 137. "To hold that the legislature could not enlarge the corporate limits by an act passed for that purpose would be to deny that it could create or abolish for the greater includes the lesser in law as in mathematics." *Williams v. Nashville*, 89 Tenn. 491. We do not think that the act of 1886 in prohibiting territories then and thereafter to be organized from incorporating cities by a special law limits the general power subsequently given by the Organic Act of Hawaii to create city municipalities. There are several reasons for this view. To hold otherwise would be limiting the general powers given by the Organic Act or in many of the laws of Hawaii continued in force by the Organic Act, as, for instance, those which relate to public highways. The word "create" in Sec. 56 is appropriately used in respect to involuntary municipal corporations established by special law, while some such term as "authorizing" would be more often used to describe the establishment of municipal corporations voluntarily accepted by popular vote. In view of the practice on the subject as above mentioned it cannot be said that there is an implied limitation upon a general power to create city municipalities. Again, a special law upon the subject is more appropriate to older communities, such as that of Hawaii, while a general law appears to be regarded as more adapted to newly settled territories and states. Conditions in Hawaii are not such as to make it obvious that the territorial legislature should not under its general power to create cities do so by special enactment fitted for the conditions in each particular case, and we think that if Congress had intended such limitation it would have been expressed in the act itself.

Emmeluth v. Board of Supervisors, 19 Haw. 171.

There are many provisions in the chapter of the U. S. Rev. Stats. entitled "provisions common to all the territories," Secs. 1839-1895, which have been superseded or modified by subsequent acts of Congress relating to territories not mentioned in that chapter. Upon the whole, we have no doubt that the last and effective expression of congressional will upon this subject is contained in the express and unlimited power granted by the Organic Act.

It is admitted that the Act incorporating the City and County of Honolulu requires other and different qualifications for electors than are prescribed in the Organic Act. Section 60 of the Organic Act provides that in order to be qualified to vote for representatives a person shall prior to each regular election, during the time prescribed by law for registration, have caused his name to be entered on the register of voters for representatives for his district, and Section 62 provides that in order to be qualified to vote for senators, and for voting *in all other elections* in the Territory of Hawaii, a person must possess all the qualifications and be subject to all the conditions required of voters for representatives. By Section 64 of the Organic Act, the rules and regulations for administering oaths and holding elections set forth in Ballou's compilation, civil laws, appendix, and the list of registering districts and precincts appended, are continued in force with certain designated changes. Section 38, R. L., provides that the boards of registration shall meet within their respective districts at such times between the last day of August and the 10th day of October in the year 1906, and between such days in each second year thereafter, as many times as may be necessary to enable them to register all persons entitled to register, and Section 30, R. L., provides that at any intermediate special election the register of voters at the last preceding general election shall be used without change.

Sections 42 and 70 of the Act incorporating the City and County of Honolulu are in conflict with the provisions of the

Emmeluth v. Board of Supervisors, 19 Haw. 171.

Organic Act relative to the qualifications of electors and absolutely void. But the entire act is not thereby made inoperative or invalid, the provisions of the Organic Act on the subject of qualifications for electors being as effective as if especially expressed in the Municipal Act, particularly in view of the fact that in Sec. 40 they are declared to be applicable.

There is no merit in the petitioner's claim that the act is void because it impairs contract obligations of private corporations or because it authorizes taxation of rural lands incapable of receiving the usual benefits of municipal organizations, or because the boundaries of the municipal organizations are inaccurate, indefinite or uncertain.

The circuit judge is advised that upon the foregoing considerations the defendants' demurrer ought to be sustained and the plaintiff's petition dismissed.

W. S. Edings for petitioner.

F. W. Milverton, Deputy County Attorney, for the defendants.

S. B. Kingsbury, by leave of court, against the petition.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND
WILLIAM O. SMITH, TRUSTEES, *v.* TERRITORY
OF HAWAII.

APPEAL FROM CLERK RE TAXATION OF COSTS.

ARGUED AUGUST 27, 1908.

DECIDED SEPTEMBER 8, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

COSTS.

The United States Supreme Court having reversed with costs the judgment of this court sustaining defendant's demurrer, and having remanded the cause, the defendant, who finally prevailed, cannot tax against plaintiffs the costs which it paid pursuant to the mandate of the appellate court.

Lowrey v. Territory of Hawaii, 19 Haw. 179.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by plaintiffs from the ruling of the clerk in regard to the taxation of costs. The judgment of this court sustaining defendant's demurrer was reversed with costs by the United States Supreme Court and the cause was remanded. 206 U. S. 206. Then, after a trial upon the facts, this court found for the defendant. The clerk taxed against the plaintiffs as part of the costs an item of \$102.50, which were the costs on appeal to the United States Supreme Court and which were paid by the defendant pursuant to the mandate of that court. From that ruling plaintiffs appeal.

It is claimed on behalf of defendant that the item in question was an "actual disbursement" within R. L. Sec. 1889, and having been deemed reasonable by the taxing officer should be allowed to stand, as it finally prevailed in the litigation. On the other hand, plaintiffs claim that as they prevailed in the United States Supreme Court and as that court ordered the costs of such appeal to be paid by defendant, this court cannot directly or indirectly reverse that order. Irrespective of whether the amount was an "actual disbursement" within the meaning of our statute, it is our opinion that the contention of plaintiffs is correct.

There are two methods of awarding costs. All costs may be taxed against the party finally losing irrespective of the disposition of interlocutory pleadings, or the costs of an unsuccessful demurrer or plea may be taxed against the pleader irrespective of the final outcome of the case. It is argued that the first method is in accordance with the practice in this jurisdiction, following an old rule of court no longer in force (Rule 14, April 1, 1887. 5 Haw. iv.) The item now in dispute, however, is governed by the practice of the United States Supreme Court which, as shown by the mandate in this very case, is to tax the costs of a demurrer against the unsuccessful pleader.

Lowrey v. Territory of Hawaii, 19 Haw. 179.

The ruling of the clerk is reversed and the amount of \$102.50 in the defendant's bill of costs is disallowed.

C. H. Olson for plaintiffs.

A. D. Larnach; Deputy Attorney General, for defendant.

IN RE APPEAL OF L. T. PECK, A. F. JUDD, A. PERRY
AND J. A. THOMPSON.

APPEAL FROM THE AUDITOR.

SUBMITTED AUGUST 27, 1908.

DECIDED SEPTEMBER 8, 1908

HARTWELL, C.J., WILDER AND BALLOU, JJ.

OFFICERS—*employees*.

A clerk of court who made typewritten copies of the report of the tax commission working out of office hours is not an officer or employee of the Territory within the meaning of the appropriation bills.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a ruling of the auditor refusing to issue a warrant in favor of J. A. Thompson for making typewritten copies of the report of the tax commission.

Thompson is a clerk of the court drawing a salary of more than \$100 a month under Act 126 S. L., 1907, entitled "An Act providing for salaries and pay of employees of the Territory." On June 26, 1908, he entered into a contract with the tax commission to make and deliver not later than June 30, 1908, typewritten copies of its report, it being agreed that the work should be done at night and on an intervening Sunday, and that he be paid for the work at the regular rates, which in this case amounted to \$60.40. Thompson complied with his

In re Peck, 19 Haw. 181.

part of the contract to the satisfaction of the members of the tax commission.

The auditor refused to issue a warrant for the work done in view of Sec. 3 of Act 126 referred to which reads as follows: "No officer or other employee of the Territory holding more than one office or employment shall be authorized to draw more than the salary of the highest grade of the office or employment held by him, provided the aggregate salaries to any one person shall not exceed one hundred dollars per month; and he shall be entitled to no other or further compensation."

The expenses of the tax commission were provided for in Act 127 S. L. 1907, entitled "An Act making appropriations for the departmental use of the Territory," and which did not contain the provision in the other act which has been referred to.

It is clear, and conceded, that Thompson, by virtue of being a clerk of the court, is an officer of the Territory, and it is equally clear that doing the work in question for the tax commission did not make him hold more than one office. The question then is, did Thompson, by virtue of his contract with the tax commission, become an employee of the Territory or hold an employment within the meaning of the statute referred to.

A common and ordinary meaning of the word "employee" is one who works for a salary or wages under directions. See 15 Cyc. 1032; Century Dictionary. We think this is the sense in which it is used in the appropriation bill. It also involves the idea of continuity of service and excludes that of being engaged for a special or single transaction. As was said by the U. S. Supreme Court in *Louisville etc., Railroad Co. v. Wilson*, 138 U. S. 501, 505, "the terms 'officers' and 'employees' both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service and exclude those employed for a special and single transaction. An attor-

In re Peck, 19 Haw. 181.

ney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee."

The contention of the auditor if upheld would lead to results not contemplated by the statute. For instance, an attorney could not be engaged by the attorney general and paid out of the incidental fund of his department in more than one case a month if the bill for services was over \$100, nor could any one do work for the Territory of the kind here, namely, typewriting, if it should cost more than \$100 in one month.

The auditor is directed to issue the warrant in question.

A. Perry and *A. F. Judd* for appellants.

C. R. Hemenway, Attorney General, for Auditor.

BISHOP TRUST COMPANY, LTD., v. OAHU SUGAR COMPANY, LTD.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED AUGUST 28, 1908.

DECIDED SEPTEMBER 21, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TRUSTS—*instructions by court.*

A court of equity will not ordinarily instruct a trustee not judicially appointed as to the details of the management of the trust, except to protect him from risk of future liability or in matters of special importance to the interests of the beneficiaries.

OPINION OF THE COURT BY BALLOU, J.

The plaintiff, trustee under a deed of trust to secure the bonds of the defendant corporation, brought this bill for instruc-

Bishop Trust Co. v. Oahu Sugar Co., 19 Haw. 183.

tions and the questions upon which the trustee desired instructions were reserved for the consideration of the supreme court. The bill alleges that there are moneys in the sinking fund provided for by the trust deed which the defendant has requested should be invested in the bonds of the corporation itself, but plaintiff, while admitting that the investment is advisable if authorized, has refused to comply with this request without the instruction of the court that it is authorized to make this investment. Defendant has also requested plaintiff to advertise for the purchase of bonds under another section of the trust deed and to pay for them out of the sinking fund, which request has met with the same conditional refusal. It is stated in the briefs and argument that the refusal of plaintiff was based upon the advice of its counsel that it was not authorized to comply with these requests, and the trustee does not allege any doubt, difficulty or embarrassment in the matter, which are the usual jurisdictional allegations, (22 Enc. P. & P. 69,) but merely its refusal to act except under instructions.

All the cases in which instructions will or will not be given do not appear to have been defined. *Clay v. Gurley*, 62 Ala. 14. The court should not require trustees to incur risk in the management or distribution of trust funds, but on the other hand it should not be placed in the position of general legal adviser as to every detail of management, particularly in respect to trusts confided by private contract to a trustee selected by the parties themselves. The following rule is frequently quoted, although it must be admitted that it was not necessary to the decision of the cases cited, in all of which the applications were premature:

"The principal requisites for a bill for instructions have often been said to be the possession of a fiduciary fund of which some disposition is necessarily to be made presently; conflicting claims, or the probability thereof; and the existence of no other means of determining rights or demands so as to protect a trus-

Bishop Trust Co. v. Oahu Sugar Co., 19 Haw. 183.

tee from the risks of future liability or controversy. *Putnam v. Collamore*, 109 Mass. 509; *Muldoon v. Muldoon*, 133 Mass. 111." *Bullard v. Attorney General*, 153 Mass. 249; *Stapylton v. Neeley*, 44 Fla. 212; 32 So. 868.

In the present case the trustee may avoid all risk of future liability by following the advice of its counsel and confining itself to investments plainly within the terms of the trust deed. It is urged, however, that an ultra conservative course is often detrimental to the interests of the trust estate, and that courts have frequently given instructions in cases, where, as here, the trustee had the option of avoiding responsibility by a course obviously safe. Instances of such cases are *Winthrop v. Attorney General*, 128 Mass. 258, in which trustees proposed to turn over the management of the trust to Harvard College, and were instructed that they could not; and *Wiswell v. First Congregational Church*, 14 Oh. St. 31, in which trustees proposed to divide church property between two separating congregations and were instructed that they could. In other cases cited, *Griggs v. Veghte*, 47 N. J. E. 179 and *Goddard v. Brown*, 12 R. I. 31, to which might be added *Carter v. Carter*, 14 Haw. 505, questions like those at bar were answered incidentally to instructions on other points plainly within the rule. In *Re Newark Savings Institution*, 28 N. J. E. 552, referred to in *Una v. Dodd*, 39 N. J. E. 173, the court went further than we think proper, in constituting itself receiver of an embarrassed bank under color of its jurisdiction over trusts, and assuming the responsibility of its management. In *Milligan v. Pleasants*, 74 Md. 8, 21 At. 695, the court authorized a departure from the letter of the trust to avoid a useless circumlocution. In *Lowe v. Conventon, etc., Church*, 83 Md. 409, 35 At. 87, the court held that a trustee appointed by a court in place of the one selected by the testator did not have the discretion concerning investments confided to the latter, the converse of which would appear to be that the trustee to whom such dis-

Bishop Trust Co. v. Oahu Sugar Co., 19 Haw. 183.

cretion was originally given should not have that discretion unduly controlled by the court.

Upon consideration of all the cases it appears that where the element of protection to the trustee is lacking it should require a strong case to enable the trustee to call on the court for legal advice. It is not so much the inherent difficulty of the question as its importance to the interests of the beneficiaries and the existence of a bona fide doubt that justifies the application. A proposed diversion of the entire corpus, as in *Winthrop v. Attorney General*, 128 Mass. 258, and *Wiswell v. First Congregational Church*, 14 Oh. St. 31, might present grounds for relief, while a proposed investment in a certain security while others are unquestionably authorized and available might not.

In the present case the party mostly concerned in having the advice of the trustee's counsel overruled is Oahu Sugar Company, Ltd. It is argued that this defendant is in the position of a cestui que trust, but this is true only in a remote sense. The trustee was appointed for the protection of the bondholders, and the mortgagor, to whom the property is to be released after discharge of the mortgage debt, though interested in the administration of the trust, is not usually classed as a cestui que trust. The bondholders, who are the real beneficiaries, and usually the principal defendants in a case of this kind, do not appear to have been concerned in the controversy, and were not originally made parties. After the case was brought and questions reserved those known to plaintiff and residing within the jurisdiction were made defendants and entered a formal appearance. Their interests do not appear to be in jeopardy whichever course the trustee may pursue. The amount now in the sinking fund is \$1884.01, and the allegation that large sums are ready to be paid in does not, of course, add anything to the right to present instructions. *Bullard v. Attorney General*, 153 Mass. 249. Bonds of other corporations and other trust investments are available if the bonds

Bishop Trust Co. v. Oahu Sugar Co., 19 Haw. 183.

of Oahu Sugar Company, Ltd., are not purchased. If the question involves the retirement of any of the bonds at an earlier date than contemplated by the trust deed it is not easy to say whether the disadvantage of having the bonds subject to an earlier call outweighs the advantage of increased security resulting from the diminution of the mortgage debt in times of prosperity. It is true that investments of the sinking fund must be made with the consent of the defendant, and it is apparently admitted that the defendant by withholding its consent to any other investment than its own bonds may force the trustee to hold the sinking fund in cash, but if this position is tenable, it is a mischief arising from the defendant's taking advantage of the terms of the trust deed, and the resulting loss of interest falls upon the defendant and not upon the bondholders.

Upon the whole, while a court of equity should always be ready to protect trustees from risk of future liability, and may in its discretion advise upon matters of special importance to the interests of the beneficiaries, we are unwilling to establish a precedent for application to the court in a case like the present. The reserved questions are accordingly returned unanswered.

C. H. Olson (Holmes & Stanley with him on the brief) for plaintiff.

Henry E. Cooper for defendant.

LUCIO FERREIRA v. KAMO; PAAUHAU SUGAR
PLANTATION COMPANY, GARNISHEE.

ERROR TO DISTRICT MAGISTRATE OF HAMAKUA, HAWAII.

SUBMITTED SEPTEMBER 14, 1908.

DECIDED SEPTEMBER 21, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

APPEAL AND ERROR—*amending record from district court.*

An appellate court has no power to amend the record of a

Ferreira v. Kamo, 19 Haw. 187.

trial court by original action. A party impugning the verity of a record should make application to the court in which the error is alleged to have occurred.

OPINION OF THE COURT BY BALLOU. J.

Upon the first trial of this case before the district magistrate of Hamakua, Hawaii, the magistrate discharged the garnishee. Plaintiff brought a writ of error and this court reversed the decision holding that while service on the garnishee was defective the defect was waived by a general appearance by the garnishee through R. H. Makekau, an attorney. *Ferreira v. Kamo*, 18 Haw. 593. Upon the case being remanded the district magistrate gave judgment against the garnishee for the full amount of the plaintiff's claim and the garnishee in turn sued out a writ of error. In response to this writ the district magistrate made a return to the effect that the records and all exhibits in the case had already been sent to the supreme court in obedience to the first writ of error. The garnishee then filed the present suggestion and motion to amend the record, alleging that the record is incomplete and does not contain all the records and exhibits and also that an error has been made by the district magistrate in the statement that the garnishee appeared by the attorney Makekau. The motion was supported by affidavits.

Upon hearing the motion, this court without passing upon its merits ordered that the record be returned to the district magistrate in order that it might be amended if necessary to make it conform to the true state of facts. *Ferreira v. Kamo*, 19 Haw. 162. In response to this suggestion the district magistrate returned the record with the following return:

"That the record in the above entitled cause as sent up by him to the Hon. Supreme Court of the Territory of Hawaii, in obedience to Two Writs of Error issued by and under the seal of the Hon. Supreme Court aforesaid, in the above cause, is complete and that the same is true and correct.

Ferreira v. Kamo, 19 Haw. 187.

"That all of the proceedings had in said cause are truthfully recorded in said record. That no Lease nor any deed, nor any portions thereof were ever offered in evidence during the trial and hearing of said cause.

"That all exhibits and papers that were filed in said cause were sent up by him in obedience to the Writs of Error issued as aforesaid.

"That he has not withheld any papers or exhibits pertaining to said cause."

The motion to amend the record is now renewed by the garnishee.

An appellate court has ordinarily no power to amend or alter the record of an inferior court. *H'oster v. Woodfin*, 65 N. C. 29. The proper practice is to make application to the court in whose record the error is alleged to have occurred. 2 Enc. Pl. & Pr. 301; 17 Enc. Pl. & Pr. 917. The granting or refusal of the application may be reviewed like any other judicial order. *Pleyte v. Pleyte*, 15 Colo. 44.

District courts in Hawaii are not courts of record and their proceedings are somewhat informal. Nevertheless, when it appears, as it does from the last return of the magistrate, that the proposed amendments are controverted and apparently raise issues of fact, the unsatisfactory nature of a trial upon affidavits of matters occurring in another court renders the general rule applicable. This is well illustrated in the present case. The explicit affidavits that the indenture of lease and deed were offered in evidence are met by the explicit denial by the district magistrate that any lease or deed was ever offered in evidence. Upon the point as to whether Makekau appeared for the garnishee the affidavits that he did not are positive, while the return of the district magistrate merely reiterates that this record is true and correct. Upon neither point is there any detailed evidence from which we might judge how the misunderstanding, if any, arose. The ultimate issue may prove to be one of pure fact, one of the conclusions to be drawn from certain facts, or

Ferreira v. Kamo, 19 Haw. 187.

one of the law applicable to undisputed facts. All this should appear in the course of proceedings had before the district magistrate.

The motion is denied, without prejudice to an application to amend in the district court.

S. F. Chillingworth for plaintiff.

No appearance for defendant.

Henry E. Cooper for garnishee.

CHING TAM SHEE, EXECUTRIX UNDER THE WILL
OF C. WINAM, DECEASED, *v.* WILLIAM A. HALL.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 14, 1908.

DECIDED SEPTEMBER 25, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

LANDLORD AND TENANT—*equity—relief against forfeiture.*

In the absence of fraud, accident, mistake, or surprise, equity will not relieve against the forfeiture of a lease for breaches of covenants to repair buildings and to build and maintain sidewalks.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by plaintiff from a decree sustaining a demurrer to plaintiff's amended bill in equity to relieve against the forfeiture of a lease which was made by the defendant to one C. Winam in 1903. Winam died in the early part of this year and plaintiff was appointed executrix under his will on April 14, 1908, three days after which appointment the defendant brought an action against her under the summary proceeding statute (R. L. ch. 133) to forfeit the lease for alleged breaches by Winam in his lifetime of the following covenants, namely, (1) to deposit with the lessor insurance policies of the buildings on the premises, (2) to pay the taxes for the year 1907,

Ching Tam Shee v. Hall, 19 Haw. 190.

(3) to keep the premises in good and tenantable order and condition, and (4) to build, maintain and repair the sidewalks and curbing about the premises. On April 27, 1908, judgment was rendered in favor of the lessor and on the next day he was put in possession of the premises and plaintiff evicted, after which an appeal was taken to the circuit court, jury waived, which is still pending and undetermined. It is alleged that these breaches were committed without the knowledge of plaintiff and without her fault and with the consent and acquiescence of the defendant, and plaintiff offers to conform to and abide by the covenants in question. It is further alleged that no damage has accrued to defendant other than such as will be fully compensated for by the compliance with the covenants; that unless relief is given it will be a great hardship on plaintiff as she will otherwise be left homeless and in destitute circumstances; that until after the death of Winam no complaint was made of the violation of any of the covenants and no action was instituted to forfeit the lease; and finally that defendant has waived all breaches by accepting rent up to April 20, 1908. The defendant demurred to the amended bill for want of equity and the demurrer was sustained. Plaintiff appealed.

The demurrer was properly sustained.

The consent and acquiescence of the defendant in the alleged breaches, if proved, would constitute a waiver or estoppel so as to preclude the defendant from maintaining his summary proceeding action, and is as much a matter of defense in that action as if the lessee's claim was that no breach had occurred at all. Equity will not relieve against a forfeiture in the one case any more than in the other. In *Gordon v. Richardson*, 185 Mass. 492, 495, it was said: "We have not considered the plaintiff's argument that there was no forfeiture of the lease. We are of opinion that in a bill in equity to be relieved from a forfeiture at law it is not open to him to make the contention that there is no forfeiture at law."

Ching Tam Shee v. Hall, 19 Haw. 190.

The general rule as to when equity will relieve against a forfeiture of a lease in a case of this kind is well stated in *Henrique v. Paris*, 10 Haw. 408, 411, where it is said that "Courts of equity regard the performance of covenants in leases as the real object desired, and the right of entry as mere security for such performance, and so they do not always hold parties strictly to their legal rights, but often relieve against a forfeiture, especially if full and exact compensation can be made to the injured party. Accordingly, in case of a breach of a covenant to pay rent, relief is generally granted against a forfeiture, because payment of the rent with interest thereon is deemed full and exact compensation. But in the case of other covenants, as to repair, insure, clear off lantana, &c., relief will not generally, except in cases of fraud, mistake, accident or surprise, be granted, because the exact compensation cannot be ascertained. And even in cases where exact compensation can be made, relief will not be granted if the breach is due to gross negligence or is persistent and wilful on the part of the lessee. See *Garrett v. Macfarlane*, 6 Haw. 435; 1 Pom. Eq. Jur., Secs. 452-454; Taylor, Ld. & Ten., Sec. 496."

In this case there is no element of fraud, mistake, accident, or surprise, and it follows that, at least so far as the covenants to repair buildings and to build and maintain the sidewalks are concerned, equity will not relieve. As to whether or not equity will relieve against the forfeiture for breach of covenants to deposit insurance policies with the lessor and to pay taxes, it is unnecessary to say.

That the breaches were committed by Winam without the knowledge or fault of plaintiff is immaterial, and it is expressly provided in the lease that the acceptance of rent should not be a waiver of a breach of covenant.

The decree appealed from is affirmed.

R. W. Breckons and *W. W. Thayer* for plaintiff.

C. W. Ashford for defendant.

In re Taxes, Pineapple Companies, 19 Haw. 193.

IN RE ASSESSMENT OF TAXES, WAHIAWA CONSOLIDATED PINEAPPLE COMPANY, LTD., HAWAIIAN PINEAPPLE COMPANY, LTD., PEARL CITY FRUIT COMPANY, LTD., HONOLULU PACKING COMPANY, LTD.

APPEALS FROM TAX APPEAL COURT, OAHU.

IN RE ASSESSMENT OF TAXES, HAIKU FRUIT AND PACKING COMPANY, LTD.

APPEAL FROM TAX APPEAL COURT, MAUI.

IN RE ASSESSMENT OF TAXES, HILO FRUIT COMPANY, LTD.

APPEAL FROM TAX APPEAL COURT, HAWAII.

IN RE ASSESSMENT OF TAXES, KAUAI FRUIT AND LAND COMPANY, LTD.

APPEAL FROM TAX APPEAL COURT, KAUAI.

SUBMITTED SEPTEMBER 28, 1908.

DECIDED OCTOBER 5, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TAXATION—*exemption under statute.*

S. L. 1907, Act 77, exempting all property, real and personal, used in the cultivation and production of pineapples does not exempt establishments for canning pineapples.

A proviso that such exemption shall not apply to land in excess of forty acres does not limit the exemption of personal property.

CONSTITUTIONAL LAW—*repeal of exemption.*

A general exemption from taxation for a definite period is repealable by subsequent legislation.

OPINION OF THE COURT BY BALLOU, J.

The above entitled cases, involving the taxation of the property of pineapple companies, were submitted together, the

In re Taxes, Pineapple Companies, 19 Haw. 193.

companies claiming an exemption of all real and personal property with the exception of forty acres of land each, including in their claim for exemption their establishments for canning pineapples. The Honolulu Packing Company, Ltd., holds more than forty acres of land under lease but has no cannery. The remaining Oahu corporations have each more than forty acres either in fee simple or leasehold and their own canneries. The tax appeal court of Oahu allowed the total exemption claimed and the tax assessor appealed. The Haiku Fruit and Packing Company, Ltd., holds more than forty acres of land and owns its own cannery. Its claim of exemption was sustained by the tax appeal court of Maui and the tax assessor appealed. The Hilo Fruit Company, Ltd., does not maintain a plantation but owns a cannery. The tax appeal court of Hawaii sustained the assessment made by the assessor and the taxpayer appealed. The Káui Fruit and Land Company, Ltd., owns less than forty acres of land and a cannery. The tax appeal court of Kauai held that S. L. 1907, Act 77, did not go into effect until the completion of the five-year term of exemption granted by R. L. Sec. 1223, and granted a full exemption under that section, from which decision the tax assessor appealed.

The issues involve the construction of S. L. 1907, Act 77, which was passed over the governor's veto April 17, 1907, and reads as follows:

"Section 1. That Section 1223 of the Revised Laws of Hawaii is hereby amended so as to read as follows:

"Section 1223. Property used in certain industries. For the five years from December 31, 1907, all property, real and personal, solely and actually used in the cultivation and production of sisal fibre, castor oil, copra, vanilla extract, Hawaiian starch, pineapples, arrowroot and manioca starch (Kasawa), shall be exempt from property taxes thereon; provided, however, that such exemption shall not apply to any land in excess of forty acres used by any one person, firm or corporation in the cultivation and production of pineapples.

In re Taxes, Pineapple Companies, 19 Haw. 193.

“Section 2. This Act shall take effect from and after the date of its approval.”

In support of the claim that canneries are exempt from taxation it is argued that the word “pineapple” applies equally to the canned and the fresh fruit; that it is impossible to market the bulk of the Hawaiian crop without canning; that all the other articles enumerated, with the possible exception of arrowroot, are manufactured articles; and that no reason appears for exempting the necessary machinery in those cases which is not applicable to canning machinery. It is also urged that under the statute now amended the tax assessors have hitherto exempted canneries, and that this is entitled to weight as an executive construction. While these arguments have considerable strength, we are nevertheless of the opinion that the cultivation and production of pineapples ceases when the pineapple is produced, and that this would ordinarily be understood to refer to the fresh fruit commonly known and marketed under that name. In the process of canning the fruit is turned to a uniform size, cored, sliced, preserved in its own juice with the addition of a certain amount of sugar, and hermetically sealed in tin cans. The marketable portions of the fruit lost in this process are canned in other forms. “The production of pineapples” does not appear to be apt language for describing this process. The general rule that an exemption from the equal burden of taxation must be clearly expressed in order to be available is in this case strengthened by the restrictive words “solely and actually” inserted by this amendment, while the limitation upon the exemption of land negatives any general intent to exempt the entire pineapple industry.

The various tax assessors construed the exemption as applicable only to forty acres of land and to the personal property necessary to a plantation of that size. We are, however, unable to find in the statute any limitation upon the exemption

In re Taxes, Pineapple Companies, 19 Haw. 193.

of personal property solely and actually used in the cultivation and production of pineapples. It might perhaps have been more logical for the legislature, when limiting the exemption of land to forty acres, to have limited the exemption of personal property to that adapted to the cultivation of that area, but such limitation is nowhere expressed in the statute and we see no necessity for putting a forced construction upon the word "land" in order to accomplish that result. In some legal connections the word is no doubt used as coextensive with "real property," but primarily it means "the soil, or a portion of the earth's crust" (*Frederick v. Dickey*, 91 Cal. 358), including land held under lease as well as in fee simple, and the exemption of forty acres would necessarily carry an exemption of the growing crop thereon.

In regard to the point upon which the Kauai case was decided, the act by its terms takes effect from and after the date of its approval and specifies definitely the period during which exemptions are to be in effect. The statute thus cuts short one year the unlimited exemption as to pineapple land granted by the original section of the Revised Laws. We have nothing to do with the propriety of this if it was within the power of the legislature, and the authorities are uniform in holding that a general exemption from taxation for a definite period does not constitute a contract with those who have expended money upon its faith, but is repealable by subsequent legislative action. *Welch v. Cook*, 97 U. S. 541.

Our conclusion is that the statute exempts from taxation all personal property and all real property other than land, solely and actually used in the cultivation and production of pineapples, and all land up to forty acres so used by any one person, firm or corporation, but does not exempt establishments for the canning of pineapples, whether owned by the planter or by an independent corporation.

Decrees will be entered accordingly.

In re Taxes, Pineapple Companies, 19 Haw. 193.

Kinney & Marx for Kauai Fruit & Land Company, Ltd.

Smith & Lewis for Haiku Fruit & Packing Co., Ltd.

L. A. Thurston and *Antonio Perry* for the Oahu and Hawaii corporations.

William L. Whitney, Deputy Attorney General, and *C. R. Hemenway*, Attorney General, for the tax assessors.

KUMAZO MATSUMURA *v.* THE COUNTY OF HAWAII.

RESERVED QUESTION FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED OCTOBER 5, 1908.

DECIDED OCTOBER 8, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

JUDGES—*disqualification.*

A judge is not disqualified under Sec. 84 Organic Act from sitting at the trial of a cause upon the facts in issue by reason of having sustained a demurrer to the plaintiff's declaration, which ruling was reversed by the appellate court.

OPINION OF THE COURT BY HARTWELL, C.J.

Upon the case coming up for trial in the circuit court upon the issue made by the defendant's plea of general denial the plaintiff objected to the judge on the ground that in sustaining the defendant's demurrer which this court overruled on exceptions (19 Haw. 18,) and by entering judgment for the defendant he was disqualified under Sec. 84 of the Organic Act which prohibits a judge from sitting "on an appeal or new trial in any case in which he may have given a previous judgment." The question whether this was a disqualification was reserved by the judge for the consideration of this court.

The plaintiff contends that the case was decided by the judge in sustaining the demurrer on the ground of the defendant's

Matsumura v. County of Hawaii, 19 Haw. 197.

nonliability and that the decision was equivalent to giving a judgment in the case, the plaintiff not amending his declaration, and also that a trial of the case on the facts would be a new trial within the provision of the act. It is immaterial whether this is the kind of judgment intended by the statute to disqualify from sitting upon a new trial which means that the case shall have had a previous trial on an issue of fact. The statute must be taken to refer to the new trial known to the common law. See Bouvier's Law Dictionary and common law writers, *passim*.

The question reserved is answered in the negative.

Carl S. Smith for plaintiff.

Charles Williams, County Attorney of Hawaii, for defendant.

TERRITORY OF HAWAII *v.* J. F. CARTER.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED OCTOBER 1, 1908.

DECIDED OCTOBER 12, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CRIMINAL LAW—*misdemeanors committed on naval reservation—jurisdiction.*

The territorial district courts have jurisdiction of misdemeanors committed on land reserved for naval purposes.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by defendant on points of law from the district magistrate of Honolulu, the sole question to be decided being whether the district court has jurisdiction of an assault and battery committed by a lieutenant commander of the United States navy on the naval reservation in Honolulu. The

Territory v. Carter, 19 Haw. 198.

land in question on which this assault and battery was committed was ceded by the Republic of Hawaii to the United States and accepted by the Newlands resolution approved July 7, 1898. On November 10, 1899, a parcel of land including the one in question was reserved by the President of the United States for naval purposes "subject to such legislative action as the Congress of the United States may take with respect thereto."

It is contended on behalf of the defendant that the territorial courts have no jurisdiction over misdemeanors committed in this Territory on land reserved for naval and military purposes. This follows, he claims, because of the constitution, or, if not, then on account of the Organic Act.

The provision of the constitution on which the defendant relies is found in Sec. 8 of Article 1, which provides that "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings." It is practically admitted, and it is in fact well settled, that this provision does not apply to territories as a general rule, but it is argued that the Territory of Hawaii is practically a state within the meaning of that portion of the constitution by reason of our Organic Act having constituted a separate federal court here different from the other territories and because of its having given somewhat broader powers than usual to our governor. But whatever differences there may be between this and the other territories in those respects, it is so clear that this Territory is not a state within the meaning of the constitutional provision in question that no further reference need be made to that phase of the argument.

That portion of the Organic Act which defendant has reference to is Sec. 91 thereof, which reads as follows:

Territory v. Carter, 19 Haw. 198.

“That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawai‘i.”

The claim is that when this land on which the assault took place was taken “for the uses and purposes of the United States by direction of the President” that took away the jurisdiction of territorial courts over misdemeanors committed on it. The land was reserved for naval purposes before the passage of the Organic Act and consequently this section of the act has nothing to do with the question. But even if the land had been reserved afterwards, we see no merit in defendant’s contention, as the section plainly has nothing to do with jurisdiction over crimes. There is nothing in the language to indicate that in parting with the “possession, use and control” of land taken for the uses and purposes of the United States, the Territory was to lose its criminal jurisdiction any more than in the case of land sold and patented to private parties.

Section 6 of the Organic Act provides “that the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.” One of the laws of Hawaii then in existence was the statute for the violation of which the defendant was arrested, tried and convicted, which is now R. L. Sec. 2916. That statute was not inconsistent with the constitution or the Organic Act or any law of the United States to which our attention has been directed or which we have been able to find, and consequently congress continued it in force. In addition, however, congress went further and

Territory v. Carter, 19 Haw. 198.

provided in Sec. 81 of the Organic Act that "until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their *jurisdiction* and procedure shall continue in force except as herein otherwise provided." It is not otherwise provided in the Organic Act that the jurisdiction of the territorial courts over misdemeanors of the kind in question committed on naval reservations was taken away, nor has our legislature or congress since changed that jurisdiction in this respect. The Organic Act in conferring criminal jurisdiction does not distinguish between misdemeanors committed on land reserved for naval purposes and those committed elsewhere in the Territory. It follows, therefore, that the district court had jurisdiction in this case.

The conclusion at which we have arrived is the same as that in *Territory v. Burgess*, 8 Mont. 57, and in *Reynolds v. People*, 1 Colo. 179.

Judgment affirmed.

W. L. Whitney, Deputy Attorney General, and F. W. Milverton, Deputy County Attorney, for the Territory.

M. F. Prosser (Kinney & Marx on the brief) for defendant.

TERRITORY OF HAWAII v. BLANCHE MARTIN.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 30, 1908.

DECIDED OCTOBER 15, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TERRITORIES—continuance of former law by Organic Act.

R. L. Sec. 3151, defining and punishing fornication, was continued in force as one of the laws of Hawaii by the Organic Act, notwithstanding the Edmunds-Tucker Act of 1887 covering the same subject.

Territory v. Martin, 19 Haw. 201.

OPINION OF THE COURT BY HARTWELL, C.J.

The defendant was convicted upon an indictment charging her with fornication, an offense defined in Sec. 3151 R. L. (P. C. 1869, ch. 15, S. 6; P. L. S. 91), punishable by fine not exceeding \$50 nor less than \$15 or by imprisonment at hard labor not more than three months nor less than one month in the discretion of the court. The offense was originally defined in Sec. 7, Ch. 13 of the Penal Code of 1850, and punishable by a fine of \$15, and in default of payment of the fine by imprisonment at hard labor for the term of four months. The defendant demurred to the indictment on the grounds (1) that by Sec. 711 R. S. "The jurisdiction vested in the courts of the United States in the cases hereinafter mentioned shall be exclusive of the courts of the several states," the cases mentioned including "all crimes and offenses cognizable under the laws of the United States;" (2) that Sec. 3151 R. L. is inconsistent with the constitution and laws of the United States and was not continued in force by Sec. 6 of the Organic Act, and (3) that no law of Hawaii makes the act charged a criminal offense. Motions for a new trial and in arrest of judgment were filed on grounds two and three above named and also on the ground that the act of March 3, 1887, amending Sec. 5352 R. S. and defining and providing a punishment for the crime of fornication, being a law of the United States not locally inapplicable, is extended to this Territory by Sec. 5 of the Organic Act and operates to repeal or suspend Sec. 3151 R. L. Exceptions to the overruling of the demurrer and denial of the motions present the question whether the statute under which the defendant was indicted is law in this Territory.

The act of July 1, 1862, 12 St. L. 501, is entitled "An Act to punish and prevent the practice of Polygamy in the Territories of the United States and other Places and disapproving and annulling certain Acts of the Legislative Assembly of the

Territory v. Martin, 19 Haw. 201.

Territory of Utah." Sec. 1, relating to, defining and punishing bigamy "in a Territory of the United States or other place over which the United States have exclusive jurisdiction," appears in substance in Sec. 5352 R. S., "Statutes of the United States general and permanent in their nature in force on the first day of December, one thousand eight hundred seventy-three." (Sec. 5595 R. S.) The act of March 22, 1882, 22 St. L. Ch. 47, amends Sec. 5352 R. S. by defining and punishing polygamy and unlawful cohabitation. The Edmunds-Tucker Act of March 3, 1887, 24 St. L. 635, defines and punishes adultery, incest and fornication, the latter by imprisonment not exceeding six months or fine not exceeding \$100. This act contains numerous provisions relating specifically to the Territory of Utah. Secs. 1 and 2 relating to testimony in prosecutions for bigamy, polygamy or unlawful cohabitation, and Secs. 3-5 which define and punish the offenses of adultery, incest and fornication "do not mention the place of commission of any offence; and may perhaps be held to include 'any Territory or other place over which the United States have exclusive jurisdiction,' since so much of the act of March 22, 1882, c. 47, referred to in the title of this act, as defined and punished offences, expressly included any such Territory or place. * * * We are not now required to determine the application of those provisions of the act of 1887." *France v. Connor*, 161 U. S. 67 (1896). Sec. 18, providing the common law right of dower, was held in *France v. Connor* to be inapplicable to the Territory of Wyoming where the legislature in 1869 had enacted a statute abolishing dower and enacting a law of community of property similar to that of the civil law. There is nothing in the act of 1887 which limits its application to Utah or to any other territory in which polygamy or any other of the offenses therein enumerated had become a "practice," whereas, Sec. 1891 R. S. requires that "the constitution and all laws of the United States which are not

Territory v. Martin, 19 Haw. 201.

locally inapplicable shall have the same force and effect within all the organized territories and within every territory hereafter organized as elsewhere within the United States," and by Sec. 5 of the Organic Act, "all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere in the United States." Hence it is argued the act of congress concerning the offense under consideration is the law of this Territory and precludes territorial legislation on the subject, while Sec. 6 of the Organic Act does not continue this former law of Hawaii as it is inconsistent with the United States law on the subject and also with the provision in Sec. 5 extending to this Territory, United States laws not locally inapplicable.

The defendant contends that the legislative power of this Territory extending to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States" does not authorize a law covering the same subject as is covered by an act of congress and providing a different punishment, citing, besides other cases, *Gibbons v. Ogden*, 9 Wheat. 1, which held that the exercise by congress of its power to regulate commerce precludes state legislation upon the subject. *Tua v. Carriere*, 117 U. S. 201, is also cited to show that congress having enacted a general bankrupt act under its power to establish uniform laws on the subject of bankruptcies throughout the United States a state insolvent law inconsistent therewith is suspended while the bankrupt act remains in force. "If it be true," says the defendant, "that legislation by congress on subjects of interstate commerce and bankruptcy excludes the right of the state to legislate on the same subject and that legislation by congress on the subject of bankruptcy operates as a supersession of then existing state laws on that subject, is it not equally true that legislation by congress for the territories under a constitutional grant of power includes the right of a territory to legislate on the same subject, and

Territory v. Martin, 19 Haw. 201.

that then existing territorial legislation is at least superseded.” *Davis v. Beason*, 133 U. S. 333, holds that a statute of the Territory of Idaho disfranchising and disqualifying from holding office any “polygamist, bigamist or any person cohabiting with more than one woman,” as well as any person teaching, advising or counselling bigamy or polygamy, was within the legislative power of the Territory, and that the act of March 22, 1882, had not “covered the whole subject of punitive legislation against bigamy and polygamy leaving nothing for territorial action on the subject,” was a “general law applicable to all territories” and “does not purport to restrict the legislation of the territories over kindred offences or over means for their ascertainment or prevention.” The defendant relies upon the following language of the court in that case: “The cases in which the legislation of congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of congress may well be considered as covering the entire ground. But here there is nothing of this kind.”

Upon the exercise by congress of its constitutional power to make bankruptcy laws uniform throughout the United States, state bankruptcy laws are necessarily superseded or there would be no uniformity, and its power to regulate commerce *ex vi termini* excludes regulation by the states, but its power to provide for the punishment of counterfeiters does not preclude state laws having concurrent jurisdiction over such offenses. 8 Fed. Stat. Ann. 608. Hence, as well as by virtue of the constitutional power of congress to “make all needful rules and regulations respecting the territory or other property belonging to the United States,” (Art. 4, Sec. 3), decisions concerning the exclusive jurisdiction of the United States in bankruptcy and interstate or foreign commerce laws do not imply that the federal laws, penal or civil, relating to terri-

Territory v. Martin, 19 Haw. 201.

tories exclude territorial laws upon the same subject. The facts in *Davis v. Beason* were such as to leave it a matter of surmise whether the United States supreme court would hold that the federal act of 1887 precludes territorial legislation upon the same offenses and covering the same ground but with different penalties; but if the former law of Hawaii is authorized by the Organic Act it is unnecessary to adjudicate upon the concurrent jurisdiction of the federal court.

A large portion of the argument has been devoted to the question of the applicability of the Edmunds-Tucker Act, the defendant and the county attorney claiming that it applies, the former insisting that the jurisdiction under it is exclusive and the latter that it is concurrent with that of the Territory, while the attorney general contended that the act is inapplicable since Hawaii had laws amply providing against these offenses and did not have the polygamous practices against which the Edmunds Act and its amendments made, as he claims, for its greater effectiveness, were aimed; and it is suggested that congress, in failing to give territorial district magistrates and circuit courts jurisdiction over the act or to provide for its more effective enforcement by the federal court upon other islands than that of Oahu, showed that it did not contemplate its application. There is, perhaps, force in this contention. These offenses were ordinarily tried by district magistrates and often went no further. It may be said that because the federal court is not sufficiently equipped for the administration of the Edmunds-Tucker Act throughout the group or because conditions do not appear to require any other than the former laws of Hawaii on the subject is no reason to infer that congress did not intend to apply the act and that whether it was appropriate or requisite was for congress alone to determine. The applicability to the Territory of Oklahoma of the act of February 15, 1888, Ch. 10, 25 St. L. 33, punishing horse stealing, is denied in *U. S. v. Pridgeon*, 153 U. S.

Territory v. Martin, 19 Haw. 201.

48, 53, on the ground apparently that the later act operated as a repeal of the earlier. Possibly there were special features in that case which may distinguish it from the case at bar. But it was unquestionably within the power of congress to continue the laws of Hawaii in force whether the federal act was extended here or not. We are of the opinion that under the Organic Act those laws were continued and therefore we do not pass upon the applicability of the Edmunds-Tucker Act. That act has been enforced here since the Organic Act took effect although we believe mainly in cases of bigamy and adultery arising on the Island of Oahu and it would not only be useless but inappropriate to pass upon the jurisdiction of the federal court under it.

The case does not present the question which has been argued at considerable length of the power of the territorial legislature to enact laws, defining in the same terms the offenses named in the federal act and attaching different penalties. The decisions upon the effect of such subsequent legislation appear in the following cases: In *State v. Norman*, 16 Utah, 457, in which the defendant had been convicted of adultery under the statute of the Territory of Utah making the offense punishable by imprisonment not exceeding three years, the court regarded the language above quoted from *Davis v. Beason* as not "intended to establish a doctrine that would abrogate a territorial statute like the one now in question" and considered the *Beason* case as having been decided upon the ground stated in its opinion that the act of 1887 "does not purport to restrict the legislation of the Territory over kindred offenses or over the means for their ascertainment and prevention." It was also held in *Re Murphy*, 5 Wyo. 297, and *Territory v. Guyott*, 9 Mont. 46, that a territorial law relating to the offense of bigamy was valid and could co-exist with prior legislation under the Edmunds Act of 1862 and its amendments. On the other hand, in *Territory v. Alexander* (Ariz.), 89 Pac. 514, it is held that

Territory v. Martin, 19 Haw. 201.

the federal statute supersedes the territorial statute relating to bigamy, the court regarding the Wyoming, Montana and Utah decisions as failing to recognize the "distinction between a territory and a state in their relation to the United States," saying that "an offense against a federal law and an offense created by the territorial statute are both in effect offenses against the sovereignty of the United States," and saying, with reference to *Davis v. Beason*, that from a reading of the entire case "the implication is that had the congressional act covered the entire subject matter of the Idaho statute the latter would have been superseded by the former." It is held that in respect of bigamy the federal act applies to the District of Columbia. "The crime belongs to the criminal code of the United States and there is every reason for supposing that congress intended uniformity in the definition of the crime and in the conditions that would excuse every prosecution, otherwise unavoidable conflicts would arise with danger, in many cases, of defeating the object and policy of the United States statute." *Knight v. U. S.*, 6 App. Cas. Dist. of Columbia, 5; and so of the offense of adultery, *Chase v. U. S.*, 7 Ib. 149, and *Falk v. U. S.*, 15 Ib. 446. The alternative, however, of the federal statute was an old statute of Maryland of the year 1715 in force in the district for the punishment of the offense by a fine of 1200 pounds of tobacco or £3 current money, or, on failure to pay the fine, by whipping, a statute which was held not to be "adapted to the present state of society."

Confining ourselves to the question whether the former law is continued by act of congress, the Organic Act, Sec. 81, provides that "until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." This provision would retain the jurisdiction of magistrates and circuit courts over the offenses under former laws of Hawaii unless their

Territory v. Martin, 19 Haw. 201.

continuance was unauthorized by Sec. 6 which continues in force not only the laws of Hawaii not inconsistent with the constitution or laws of the United States but those which were not inconsistent with the provisions of the act. In order that laws should not continue in force their continuance should either expressly or by clear implication be negatived or disaffirmed in other provisions of the act, the continuance not being confined to such laws as were not inconsistent with the constitution or laws of the United States. The laws under consideration are not inconsistent but in conformity with the provision in Sec. 81 by which the jurisdiction of the territorial courts remains except as otherwise provided in the act. There is significance in the express repeal in Sec. 7 of a large number of the penal laws of Hawaii which are referred to by name as well as chapter and section, as, for instance, blasphemy, vagrancy, fire arms. The attention of congress could not fail to have been directed to a subject so important as the laws relating to the establishment and preservation of the domestic relations, the foundation of civic as well as private virtue, as well as the basis of laws regulating inheritance and alienation of property and rights and obligations of married persons and their children. If congress had intended that laws directed to the enforcement of rules of decency and morality should be repealed they undoubtedly would have been included in the list of penal laws repealed. As the laws of Hawaii relating to the offenses named in the Edmunds-Tucker Act are not repealed expressly or by necessary implication and as their enforcement by territorial courts is not inconsistent with other provisions in the Organic Act but is consistent with them they remain in force under Sec. 6 even if inconsistent with the Edmunds-Tucker Act. If the section had declared that laws should continue in force which were consistent with the constitution or laws of the United States or with other provisions in the act it would perhaps more clearly appear that while laws inconsistent with

Territory v. Martin, 19 Haw. 201.

the constitution could not remain, those laws which were consistent with the Organic Act, conforming to all its provisions, would remain. This view conforms to the construction placed upon the act in *Carter v. Gear*, 16 Haw. 245, in which case the court said that the act "contains many different provisions bearing upon the same subject," that it "was enacted with reference to a highly developed system of government already existing," and "manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act." The case was affirmed in 197 U. S. 348, the court, after referring to Sec. 6, saying, "By section 7 the constitution of the Republic of Hawaii and a large number of its laws, specially enumerated, are repealed, but the statutes giving probate and equity jurisdiction to the circuit courts are not mentioned."

The statute under which the defendant is held not appearing to be inconsistent with any of the provisions of the Organic Act or with the United States constitution the defendant's exceptions are overruled.

W. L. Whitney, Deputy Attorney General (C. R. Hemenway, Attorney General, with him on the brief), also F. W. Milverton, Deputy Attorney County of Oahu, for the Territory.

A. S. Humphreys for defendant.

CONCURRING OPINION BY BALLOU, J.

Assuming that the Edmunds Act and the Edmunds-Tucker Act are in force within this Territory as contended by the defendant and held by the United States District Court for the Territory of Hawaii, it does not necessarily follow that the local statutes upon that subject are repealed or superseded. We held in *Territory v. McCandless*, 18 Haw. 616, that this question, there applied as between a territorial statute and a

Territory v. Martin, 19 Haw. 201.

county ordinance, was one of statutory construction and quite distinct from the constitutional question as to whether, assuming both laws to be in force, a man could be punished under both for the same offense. In that case the court failed to find authority for duplicating the territorial legislation but conceded that such authority might be authorized expressly or by necessary implication. There is no constitutional difficulty in two penal statutes upon the same subject even within a territory or other possession under the immediate jurisdiction of congress, as is shown by the case of an offense punishable under the articles of war (R. S. Sec. 1342) and by the local civil law of the Philippine Islands. *Grafton v. U. S.*, 206 U. S. 333.

The proposition that where congress has legislated under its constitutional powers all state or local laws upon the same subject are superseded is not of universal application and is extremely uncertain in its application to penal statutes. Of the powers given to congress and not forbidden to the states, some are exclusive while some are concurrent. Exclusive jurisdiction in matters of naturalization and bankruptcy necessarily follows from the requirement that these shall be uniform throughout the United States (*Sturges v. Crowninshield*, 4 Wheat. 122) and the power to regulate commerce among the several states is also exclusive from the necessary incompatibility between two regulations of the same subject. *Gibbons v. Ogden*, 9 Wheat. 1. On the other hand, the power to lay and collect taxes is obviously not exclusive of state legislation upon the same subject.

With regard to the exclusiveness of legislation on penal subjects the defendant relies upon the following passage: "The cases in which the legislation of congress will supersede the legislation of a state or territory without specific provisions to that effect are those in which the same matter is the subject of legislation by both. There the action of congress may well

Territory v. Martin, 19 Haw. 201.

be considered as covering the entire ground." *Davis v. Beason*, 133 U. S. 333, 348.

As applied to penal legislation by states, this dictum seems opposed to a line of authorities of which may be cited *Fox v. State*, 5 How. 410; *Moore v. Illinois*, 14 How. 13; *Sexton v. California*, 189 U. S. 319. In *U. S. v. Arjona*, 120 U. S. 479, the court, speaking of the authority of the United States to punish offenses against the law of nations, says, "This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States."

So far as the penal legislation of territories is concerned, the typical case is the existence of federal penal legislation affecting a territory followed by an attempt on the part of the territorial legislature to punish the same offenses. It was on this state of facts that the conflicting cases of *State v. Norman*, 16 Utah 457; *In re Murphy*, 5 Wyo. 297; *Territory v. Guyoti*, 9 Mont. 46, and *Territory v. Alexander* (Ariz.), 89 Pac. 514, were decided. The case at bar, however, does not involve the question of power of a legislature to enact penal laws inconsistent with federal legislation but merely the question as to which of two previously existing statutes was intended by congress to apply to a new territory. In this respect the case more nearly resembles *Kie v. United States*, 27 Fed. 351 and *United States v. Clark*, 46 Fed. 633 in which penal laws of the United States were held to take precedence over the laws of Oregon applied by the act of May 17, 1884 (23 St. at L. 24), to the Territory of Alaska. If these cases are applicable, murder and manslaughter must be withdrawn from the jurisdiction of the territorial courts in Hawaii, where the usual double jurisdiction is divided between the federal and territorial courts. These cases, however, seem irreconcilable with the later and control-

Territory v. Martin, 19 Haw. 201.

ling case of *United States v. Pridgeon*, 153 U. S. 48. In that case, previous to the organization of the Territory of Oklahoma, horse stealing in the Indian country might have been punished under the general provisions of R. S. Sec. 5356 relating to larceny in any place under the exclusive jurisdiction of the United States or under a special act concerning horse stealing in the Indian Territory (Act February 15, 1888, Ch. 10; 25 St. at L. 33). Upon the organization of the Territory of Oklahoma congress extended to the new territory for a certain period certain laws of the State of Nebraska, including the entire criminal code, "in so far as they are locally applicable and not in conflict with the laws of the United States or with this act." This language is substantially similar to that in which congress extended the criminal code of the Republic of Hawaii over the new territory (Organic Act, Sec. 6). In the Oklahoma case the supreme court held, answering a certified question, that horse stealing in the Indian country during the period mentioned was not a crime against the United States, the previous federal legislation having been superseded by the corresponding provision of the Nebraska code.

While the application of this case might lead us further than the court has found it necessary to go in this case, it certainly supports the proposition that local territorial penal legislation may be in force within a territory notwithstanding the existence of general federal legislation which would otherwise be applicable. An examination of our Organic Act leads to the same conclusion.

Upon the annexation of the Republic of Hawaii to the United States all local legislation would, under the principles of international law, remain in force until action by the legislative power of the latter. Turning now to Secs. 6 and 7 of the Organic Act, we find that there is no express repeal of the laws of Hawaii upon the general ground of their inconsistency with the laws of the United States. If Sec. 6 stood alone the

Territory v. Martin, 19 Haw. 201.

implication that inconsistent laws were repealed would probably follow from the continuing in force of the laws not inconsistent, but it would still be a repeal by implication, the necessity for which is excluded by Sec. 7, which specifically repeals over seven hundred sections and parts of sections of the laws of Hawaii by reference to both subject and number. The inference is almost irresistible that Sec. 7 contains all the Hawaiian laws which congress intended to designate as inconsistent with the laws of the United States, and that in view of the retention of the local Hawaiian tribunals to deal with local law and the establishment of a separate United States district court to deal with federal questions, congress did not consider as inconsistent the retention on the statute books of local laws upon subjects covered by federal statutes, even though the local law was to be administered by different tribunals and might result in different penalties. This view is somewhat strengthened by the inadequacy of the machinery bestowed upon the federal court upon the supposition that it was to do the police work of the entire Territory in regard to offenses against morality, to say nothing of murder, manslaughter and every other crime punishable under a United States statute. The question being one of statutory construction it appears clear that the local statute under which the defendant was convicted is in force.

TERRITORY v. G. E. SCHAEFER.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED OCTOBER 8, 1908.

DECIDED OCTOBER 16, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

COUNTIES—*constitutionality of automobile ordinance.*

Ordinance 5 of the County of Oahu, relating to the registration.

Territory v. Schaefer, 19 Haw. 214.

Identification, use and operation of motor cars, is not contrary to the 5th or 14th amendments of the Constitution.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by defendant on points of law from a decision of the district magistrate of Honolulu finding him guilty of wilfully operating a motor car on Hotel street between Bethel and Fort streets in Honolulu "at a speed greater than was reasonable and proper having regard to the traffic and occupation of said highway at said locality," contrary to ordinance 5 of the County of Oahu entitled "An Ordinance Relating to the Registration, Identification, Use and Operation of Motor Cars." The defendant claims that the ordinance in question is void as being contrary to the 5th and 14th amendments to the constitution in illegally discriminating against him and denying him the equal protection of the laws.

The first contention is that section 2 of the ordinance discriminates illegally between residents and nonresidents who are only temporarily within the Territory. This section 2 and section 6 to which it refers in the last proviso are as follows:

"Section 2. No motor car shall be operated on any highway until the same shall have been registered by the owner in accordance with the requirements of this ordinance, nor unless the same shall otherwise conform to the requirements of this ordinance.

"Provided, however, that no registration shall be required of any motor car, while the same is in stock, for sale, of any dealer in motor cars, and which may be operated on a highway by such dealer or an employee of such dealer, for the purpose of exhibition of the same to an intending purchaser, and not for hire.

"The provisions of this section shall not apply to motor vehicles owned by non residents of this Territory and only temporarily within this Territory, provided the owners thereof have complied with any law requiring the registration of owners of motor

Territory v. Schaefer, 19 Haw. 214.

vehicles in force in the State, Territory or Federal district of their residence, and the registration number showing the initial of such State, Territory or Federal district shall be displayed on such vehicle substantially as provided in Section 6."

"Section 6. Identification of Car. The owner of each motor car so registered shall, before such car shall be permitted to be operated upon any highway, display and keep displayed upon the rear part of said car, in such position that it can at all times be plainly seen, the registration number of said car, given to it by the Sheriff, under the terms of this ordinance.

"Such numbers shall be four inches in height in white on a black background."

Thus far, then, the ordinance requires the registration of cars, which is necessary for the purpose of identification in case operators of cars fail to observe their duties on the highways. 28 Cyc. 32; Huddy on Automobiles 37. By the ordinance all cars, whether owned by persons permanently or temporarily within the Territory, are required to be registered and carry a number which is uniform in size so that the car may be identified if necessary. There is nothing unreasonable in not requiring a temporary resident who has registered his car in some other territory or state to re-register it in this Territory. The requirement of registration is substantially similar for all cars, and consequently the ordinance is not unconstitutional in this respect.

The next contention involves Sec. 8 of the ordinance, which is as follows:

"Section 8. No motor car shall be operated on any highway by any person, unless such person shall have first received a chauffeur's certificate certifying that he or she is competent to operate a motor car propelled by the kind of power used on such motor car except the type or class of car specified in the chauffeur's certificate held by such person, and obtained upon the terms and in accordance with the requirements of this ordinance.

"Provided, however, that this section shall not apply to any

Territory v. Schaefer, 19 Haw. 214.

person who is learning to operate a motor car, while accompanied in the same motor car by the Examiner of Chauffeurs, or by a person holding a chauffeur's certificate issued under this act, who is acting as a teacher of such person so learning to operate such car, at a point outside of the speed limit area in this ordinance described, or those exempt under Section 2."

The claim of the defendant is that under this section chauffeurs of cars belonging to temporary residents do not require a certificate and that there consequently follows a discrimination which is invalid. This argument is based on the last words of the section "or those exempt under Section 2." While effect should be given to every word of the section, in this case it appears to us that those words are meaningless and consequently do not affect the balance of the section. This is a section prohibiting any person from operating cars on highways without a chauffeur's certificate. Section 2 deals solely with the registration of cars, and the exemptions refer to cars and not to persons. It has nothing to do with the persons who operate them. An attempt to construe "those exempt" as referring to dealers having motor cars in stock or to nonresident owners who have complied with foreign registration acts would result in exempting persons who may never have attempted to run a motor car in their lives. We are not required to put a forced construction on language in order to obtain an absurd result. R. L. Sec. 13. We are forced to the conclusion that the words are meaningless and consequently do not affect the balance of the section. That being the case, there is absolutely no discrimination in this section between what may be called resident and nonresident chauffeurs.

Defendant further contends that the ordinance discriminates by prescribing an age limit for resident chauffeurs and none for nonresident chauffeurs, and by providing for additional penalties for violations in the case of resident chauffeurs which do not follow in the case of nonresident chauffeurs. As we

Territory v. Schaefer, 19 Haw. 214.

have already held, however, under section 8 of the ordinance that all chauffeurs are treated alike, it follows that their qualifications must be the same and they are all subjected to the same penalties. The ordinance in question is not contrary to either the 5th or 14th amendments of the constitution.

Defendant finally urges that the ordinance was superseded or impliedly repealed by R. L. sections 3115 and 3116, as amended by Act 68 of the laws of 1907, following the ruling made in *Territory v. McCandless*, 18 Haw. 616, that a county has no power to prohibit by ordinance an act already made penal by territorial statute. This point of law was not stated in the certificate of appeal and consequently cannot be considered. R. L. Sec. 1858, and cases cited in the note thereto.

Judgment affirmed.

F. W. Milverton, Deputy County Attorney, for the Territory.

C. F. Clemons (*Thompson & Clemons* on the brief) for defendant.

IN THE MATTER OF THE PETITION OF KAIAHUA
(k) FOR A WRIT OF HABEAS CORPUS FOR AND
ON BEHALF OF ANAMALIA MAUNAKEA (w).

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 5, 1908.

DECIDED OCTOBER 17, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

HABEAS CORPUS—*detention of leper suspect*.

Upon habeas corpus questioning the legality of the detention of a leper suspect, the only issue is the regularity of the proceedings under the statute, and the existence or nonexistence of leprosy will not be determined collaterally.

LEPROSY—*construction of statute*.

R. L. Sec. 1122A applies to all persons in custody as leper suspects, whether arrested under warrant or not.

LEPROSY—*proceedings under statute*.

A leper suspect in custody having selected a physician to examine her in accordance with the statute, and being thereafter

In re Maunakea, 19 Haw. 218.

required without legal cause to select another, cannot be held to have waived her rights; and subsequent proceedings with the second physician are void.

OPINION OF THE COURT BY EALLOU, J.

This is an appeal by the president of the board of health from the order of the circuit judge of the first circuit discharging from custody Anamalia Maunakea, brought before him on a writ of habeas corpus. The return alleged that Mrs. Maunakea, hereinafter called the petitioner, was held in custody under the provisions of S. L. 1907, Act 122, amending R. L. Sec. 1122 and adding a new section as follows:

“Section 1122. Lepers, Confinement. The Board of Health or its agents are authorized and empowered to cause to be isolated and confined in some place or places for that purpose provided, all persons suffering with leprosy who shall be pronounced capable of spreading that disease; and it shall be the duty of each District Magistrate when properly applied to for that purpose by the Board of Health or its authorized agents to issue a penal summons to any person alleged to be suffering with leprosy or deemed capable of spreading that disease, ordering him to appear at the time and place specified in the application for such summons, then and there to submit to a medical examination for the purpose of determining whether or not he is suffering from leprosy; and in the event that such person shall fail to appear in answer to such summons said District Magistrate shall cause the arrest of such person and his delivery to the Board of Health or its agents; and it shall be the duty of the High Sheriff of the Territory of Hawaii and his deputies and of the police officers to assist in securing the conveyance of any person so summoned or arrested to such place as the Board of Health or its agents may direct, in order that such person may be subjected to a medical examination, and thereafter to assist in removing such person to a place of treatment or isolation if so required by the agents of the Board of Health. Provided, however, that such medical examination shall, in all cases, be made with the least possible delay after such summons or arrest as aforesaid.”

In re Maunakea, 19 Haw. 218.

“Section 1122A. Examination. With the least possible delay after a person has been taken into custody as provided in Section 1122 of the Revised Laws, the Board of Health shall cause such person to be carefully examined by two physicians duly licensed to practice medicine in this Territory; one of such physicians shall be chosen by the Board, and the other by the person taken into custody, or if such a person is a minor, by his parents, parent or guardian; if such person or his representatives shall fail to select a physician within ten days after the Board's selection, such right shall be lost, and the Board shall select two physicians. If the two physicians after the completion of such examination shall agree that such person is not suffering with leprosy, nor capable of spreading that disease, such person shall be released from custody and furnished by the Board with transportation home; but if the two physicians agree that such person is suffering with leprosy, and capable of spreading that disease, such person shall remain in the custody of the Board, and be confined in such place as is therefor provided by law. In case of disagreement between the two physicians as to whether such person is or is not suffering with leprosy and capable of spreading that disease, they shall, with as little delay as possible, select a third so licensed physician, and the three physicians shall proceed to make a second examination. On the completion of such second examination, the decision of any two of the three physicians that such person is or is not suffering with leprosy and capable of spreading that disease shall determine whether such person shall be released or confined in the manner hereinbefore provided.”

The evidence shows that the petitioner, being suspected of having leprosy, was notified by Dr. Goodhue on Hawaii to report at the Kalihi receiving station for examination. She came to Honolulu with other leper suspects and was met by an agent of the board of health who took her to the receiving station. Here, in accordance with the act quoted, she was notified to select a physician to examine her and selected Dr. J. Atch-erley, who, with Dr. McDonald, nominated by the board of health, made an examination. Dr. McDonald signed a certificate that the patient was suffering with, leprosy and capable of

In re Maunakea, 19 Haw. 218.

spreading that disease. Upon this certificate being presented to Dr. Atcherley he refused to sign it stating orally that the patient had leprosy but that he would not certify that she was capable of spreading the disease. There is no evidence of any further action being requested of Dr. Atcherley. Three months afterwards the petitioner was asked to select another doctor, being told by the keeper of the receiving station that Dr. Atcherley was not allowed to come there. Thereupon after some demur she selected Dr. McLennan. Dr. McLennan certified that he was unable to say whether or not the patient had or was afflicted with leprosy and he and Dr. McDonald selected Dr. Sinclair as the third physician, who certified that the patient was suffering with leprosy and capable of spreading that disease. The return of the president of the board of health set up this certificate of two doctors as justification for holding the petitioner in custody.

We cannot sustain the respondent's contention that the fact of the existence or nonexistence of leprosy is to be determined upon habeas corpus proceedings. This would enable every person regularly pronounced a leper to have the decision of the board of examining physicians reviewed by the court, which is not the tribunal designated by the legislature for that purpose. In these proceedings the legality of the detention depends upon the regularity of the proceedings by virtue of which the petitioner is held in custody. Under the amended statute a leper suspect may be held in custody only long enough to make the prescribed examination with the least possible delay, and thereafter only upon decision, rendered in accordance with the statute, that he is suffering with leprosy and capable of spreading that disease.

On the other hand we do not, as contended by the petitioner, construe the statute as requiring a penal summons followed by an arrest under warrant as conditions precedent in all cases to the examination prescribed by Sec. 1122A. The reference in

In re Maunakea, 19 Haw. 218.

the opening sentence of the paragraph to persons taken into custody as provided in Sec. 1122 does not expressly or by necessary implication exclude from the benefits of that section persons who have voluntarily surrendered themselves into custody for the purpose of examination nor those who have appeared in response to a penal summons. The intent of the legislature would have to be more clearly expressed before we could find that it was intended to give the safeguards of Sec. 1122A to the recalcitrant and deny them to those appearing voluntarily or upon simple notification.

The first physician selected by the petitioner in accordance with her rights under the statute was Dr. Atcherley, and in the orderly course of procedure the final determination in case of disagreement would have been made by a board, the third member of which was selected by him and Dr. McDonald. We are not required to say what the procedure would be in case either physician unreasonably refused to proceed in accordance with the statute, as there is no evidence of such refusal in this case. The question here turns on the regularity of the selection of Dr. McLennan with the selection of Dr. Atcherley still outstanding. Undoubtedly there are circumstances under which the patient could waive her rights and nominate another physician. Such a waiver, however, would have to be made with full knowledge of the facts. In the case at bar the evidence warrants the conclusion that the patient was required by the board of health to select another physician without legal cause therefor. Whether or not she was intimidated by a threat to send her to Molokai as claimed in her testimony is immaterial, as the conclusion can be based wholly upon the testimony of the keeper of the receiving station, called for the respondent in rebuttal, who testified that he had told her that she had to choose another doctor because Dr. Atcherley was not allowed to come there again. The nomination of a second doctor under these circumstances cannot be held to be a waiver of her rights.

In re Maunakea, 19 Haw. 218.

The order appealed from is affirmed.

C. W. Ashford for petitioner.

W. L. Whitney, Deputy Attorney General, and C. R. Hemenway, Attorney General, for respondent.

SOLOMON KAUHANE, HARRY KAUHANE, KAPEKA KAUHANE, WAIMAHUI KAUHANE AND KAMAUKEALII KAUHANE, MINORS, BY THEIR GUARDIAN, HENRY SMITH, AND KAPEKA BAKER v. WILLIAM LAA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 8, 1908.

DECIDED OCTOBER 19, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TENANCY IN COMMON—*apportionment of rent.*

The rule that rents from property owned by tenants in common and leased to a stranger are apportioned according to the interests of the owners is not altered by the fact that the lease was signed by only one cotenant with the acquiescence of the other.

OPINION OF THE COURT BY BALLOU, J.

This was an action of assumpsit for money had and received, being the rentals of certain lands which had been collected by the defendant. The land in question descended from the original patentee to Hao, who died intestate leaving a widow, Pelani, and three children, Solomon Kauhane, Haui, and the defendant Laa. Haui died, whether before or after attaining majority being in dispute on the evidence. Solomon Kauhane conveyed his interest to his mother Pelani, who was thereupon entitled to an undivided interest as tenant in common with her son the defendant. Pelani, with the consent and acquiescence of the defendant, leased the land to Su Chin Hoo. Thereafter

Kauhane v. Laa, 19 Haw. 223.

Pelani reconveyed all her interest to Solomon Kauhane, who died soon afterwards leaving the plaintiff, Kapeka Baker, his widow, and the minor plaintiffs his heirs at law. Defendant claimed that the deed from Pelani to Solomon Kauhane though recorded was never delivered, and claims under a subsequent deed from Pelani to himself in which she reserved a life interest. The defendant collected the rents due under the lease and plaintiffs obtained a verdict against him for the full amount. The defendant brings exceptions, of which the most material are those to the giving of the following instructions by the court:

"If you find from the evidence that on April 2, 1898, Pelani was the owner of an interest in the land in question and that said Pelani on said date executed a lease to said land to Su Chin Hoo, with the consent of William Laa, her cotenant in common, you must find that the grantee of Pelani and his successor or successors in interest are entitled to all the rents due from said Su Chin Hoo by the terms of said lease." Instruction 5.

"You are further instructed that whether Haui 2nd died a minor or after he had attained his majority has no bearing on the issues involved in this case." Instruction 6.

The usual rule is that tenants in common are entitled to the rentals of land leased to a stranger in proportion to their several interests. The fact that one cotenant alone signed the lease, the other acquiescing therein, is not sufficient to vary the usual rule. *Pope v. Harkins*, 16 Ala. 321. There was no evidence of any misrepresentation made by the defendant upon which Pelani or her grantee relied and therefore there is no element of estoppel. If the defendant waived his share of the rental in favor of his mother without consideration there would be no legal contract on which the plaintiffs could rely. A verdict for the entire rent based upon the fifth instruction cannot be sustained. It also follows that the quantum of interest held by Pelani and the defendant at the time of the lease was material, and as this depends upon whether Haui died a minor or

Kauhane v. Laa, 19 Haw. 223.

after he attained his majority (R. L. Sec. 2510) the sixth instruction was also erroneous.

It is unnecessary to pass in detail upon the exceptions relating to the exclusion of evidence offered in support of defendant's theory that the deed from Pelani to Solomon Kauhane was not delivered, but we are of the opinion that some of the evidence excluded, though slight, tended to support the claim and should have gone to the jury.

The exceptions are sustained and a new trial ordered.

W. W. Thayer for plaintiffs.

W. C. Achi for defendant.

JOHN S. CHANDLER v. E. A. MOTT-SMITH, SECRETARY OF THE TERRITORY OF HAWAII.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 15, 1908.

DECIDED OCTOBER 19, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

ELECTIONS—*time for filing nomination certificate.*

The statute providing that nomination papers must be filed not less than thirty days before the day of election, the fact that the thirtieth day before fell on Sunday does not entitle the candidate to file the same on the following Monday.

ELECTIONS—*validity of statute prescribing time for filing nomination certificate.*

R. L., Sec. 31, prescribing the time within which nomination certificates must be filed, is not in conflict with the Organic Act, and is valid.

OPINION OF THE COURT BY WILDER, J.

This is an application by John S. Chandler for a writ of mandamus to compel the secretary of the Territory to receive

Chandler v. Mott-Smith, 19 Haw. 225.

his nomination certificate as a candidate for senator from the fourth senatorial district, and to place his name upon the official ballot to be used at the coming general election. The nomination certificate was placed in the registered mail on Kauai on October 3, 1908, addressed to one John Emmeluth, and arrived at the postoffice in Honolulu on Sunday morning, October 4. It was tendered to the secretary on the morning of October 5, 1908, and was refused on the ground that it was not presented within the time prescribed by the statute. The secretary also refused for the same reason to place petitioner's name upon the official ballot. The postoffice regulations prohibit the delivery of registered mail in Honolulu on Sunday and Emmeluth did not get the package from the postoffice until the following day when the tender was made. The case was heard upon petition and answer, and, there being no facts in dispute, the following questions were reserved by the circuit court, namely:

"First: Is Section 31 of Chapter 7, Revised Laws of Hawaii, in conflict with Sections 60 and 62 of an Act of Congress entitled 'An Act to provide a Government for the Territory of Hawaii,' and unconstitutional and void?

"Second: Is Section 31, Chapter 7, Revised Laws of Hawaii, or so much of said section as provides that 'Such nomination shall, except as hereinafter provided, be deposited with the Secretary of the Territory not less than thirty days before the day of a general election' mandatory or directory?

"Third: Should nomination papers accompanied by a deposit of twenty-five dollars, deposited with the Secretary of the Territory, on the morning of the 5th day of October, 1908, the 4th day of October, 1908, being Sunday, be received by him and the candidate's name placed upon the official ballot to be used at a general election to take place on the 3rd day of November, 1908, said candidate being from a district other than on the Island of Oahu?

"Fourth: Should the Writ of Mandamus be issued as prayed?"

Chandler v. Mott-Smith, 19 Haw. 225.

1. The material part of the statute involved (R. L. Section 31), so far as this case is concerned, is as follows:

“No person shall be permitted to stand as a candidate for election to the legislature unless he shall be nominated and so requested in writing, signed by not less than twenty-five duly qualified electors of the district in which an election is ordered, and in which he is requested to be a candidate. Such nomination shall * * * be deposited with the secretary of the Territory not less than thirty days before the day of a general election.”

The petitioner claims that the section is void as being in conflict with sections 60 and 62 of the Organic Act in regard to the qualifications of voters for representatives and senators. There is no merit in this claim for the reason that the subject of the qualifications of voters for senators and representatives is an entirely different matter from a provision regulating the filing of nomination papers by candidates to be voted for. If the petitioner intended to claim that this section is in conflict with sections 34 and 40 of the Organic Act, which provide what is necessary in order for persons to be eligible for election as senators and representatives, that contention is also untenable for the reason that section 31 R. L., formerly section 56 of the rules and regulations for administering oaths and holding elections, Civil Laws 1897, p. 804, was specifically amended in several particulars and continued in force by section 64 of the Organic Act, and in any event there is no conflict between the general provisions of sections 34 and 40 of the Organic Act and the particular procedure required by R. L. Sec. 31. The first reserved question is answered in the negative.

2. In *Harris v. Cooper*, 14 Haw. 145, it was held that that part of section 31 R. L. requiring the filing of a nomination certificate with the secretary within a prescribed time is mandatory. We see no reason to re-examine that question at this time, and consequently the second reserved question is answered

Chandler v. Mott-Smith, 19 Haw. 225.

by holding that that part of the section referred to is mandatory.

3. In 8 Haw. 602, the justices of this court stated as their opinion that, in computing time under a law which required that a request be filed not less than fourteen days before the day of election, the day on which the request was filed is to be counted as the first of the fourteen days and the day of election excluded. Applying that rule to the case at bar, it follows that the nomination certificate, if filed on Monday, October 5, would only leave twenty-nine days before November 3, the day of election, and consequently too late according to the time prescribed by the statute. But petitioner contends that, because the last day during which papers could be filed according to that rule was October 4 and a Sunday, it should be excluded and relies in support of that contention on R. I. section 1769, which provides that "The time within which an act is to be done, as provided in any part of this chapter, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." The chapter referred to, however, relates solely to civil procedure in courts of record. Section 1769 does not in terms cover the matter of election regulations, and the Organic Act in expressly continuing in force those regulations as amended does not even by implication indicate that that section should cover them. The general rule is stated in *Schefer v. Magone*, 47 Fed. 872, to be that "the weight of authority upon this question seems to be that in computing the time within which an act required by any statute must be done, if the last day falls on a Sunday, it cannot be excluded and the act done on the following Monday, unless there is some statute providing that the Sunday should be excluded from the computation." The section in question being contrary to the general rule cannot be extended to cases to which it does not refer and which it was not intended to cover. In *State v. Falley*, 9 N. D. 464, and *Griffin v. Dingley*,

Chandler v. Mott-Smith, 19 Haw. 225.

114 Cal. 481, under statutes requiring nomination certificates to be filed not less than thirty days before election, it was held that the fact that the thirtieth day before election fell on Sunday did not entitle the candidate to file nomination papers on the following Monday, and in each of those cases there was, as here, a special statute providing that as to certain other matters if the last day be Sunday it should be excluded. The North Dakota case also holds that the time limit "has been held mandatory by every court that has ever passed upon a similar statute so far as we can ascertain." The third reserved question is answered in the negative, which requires a similar ruling as to the fourth question.

At the oral argument the petitioner also urged that even if he had tendered the nomination papers on Sunday, October 4, it would have been useless as the office of the secretary was closed on that day, and the secretary had previously given notice by proclamation that he would not receive nomination certificates after the midnight previous and that other nominations were as a matter of fact tendered on Sunday and refused by the secretary. From these facts he argues that he is in the same position as if he had actually tendered the papers on Sunday. Even if these matters appeared on the record, as they do not, still by petitioner's own showing he did not rely in any manner upon the secretary's construction of the statute, but was unable to make the tender on Sunday, and consequently was not prevented from making it or otherwise prejudiced by anything that the secretary did. All we can say is that if the nomination had been tendered on Sunday, October 4, it would have been within the time prescribed by the statute.

Accordingly the first, third and fourth reserved questions are answered in the negative and the second by holding that the statute is mandatory.

W. S. Edings for petitioner.

W. L. Whitney, Deputy Attorney General, for respondent.

In re Taxes, Pineapple Companies, 19 Haw. 230.

IN RE ASSESSMENT OF TAXES, WAHLAWA CONSOLIDATED PINEAPPLE COMPANY, LTD., HAWAIIAN PINEAPPLE COMPANY, LTD., PEARL CITY FRUIT COMPANY, LTD., HONOLULU PACKING COMPANY, LTD., AND HAIKU FRUIT AND PACKING COMPANY, LTD.

MOTIONS FOR JUDGMENTS.

ARGUED OCTOBER 17, 1908.

DECIDED OCTOBER 20, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TAXATION—*exemption of growing crops of pineapples.*

Under S. L. 1907, Act 77, exempting all property, real and personal, used in the cultivation and production of pineapples, provided that such exemption shall not apply to land in excess of forty acres, growing crops of pineapples on land in excess of forty acres are not exempt.

OPINION OF THE COURT BY BALLOU, J.

In the main opinion in these cases (*In re Taxes, Pineapple Companies*, 19 Haw. 193), the court intended to decide that growing crops on land in excess of forty acres were not exempt. On the tax assessors' motions for judgments, including assessments on growing crops of pineapples on land in excess of forty acres, the taxpayers point out that the decision was ambiguous on this point and claim that all growing crops are exempt. This is on the theory that the growing crop of pineapple plants is one of the factors by which pineapples are cultivated and produced, and that as such growing crops are personal property within R. L. Sec. 1215, which declares that the term "personal property" shall for the purposes of taxation include growing crops, they are not subject to taxation.

We agree that growing crops are used in the cultivation and production of pineapples within the meaning of the statute.

In re Taxes, Pineapple Companies, 19 Haw. 230.

The legislature, however, in providing "that such exemption shall not apply to any land in excess of forty acres" did not, as we have already held, use the word "land" as coextensive with "real property," but in its ordinary legal meaning which would include the crops on or in it the same as grass, trees, buildings or other things annexed to or a part of it. Counsel for the taxpayers assume that holding growing crops to be included in the term "land" would be inconsistent with the statute declaring them to be personal property. The fallacy lies in the assumption that land is necessarily real property. On the contrary the various elements of land are divided by the statute between real and personal property. Fee simple lands with buildings, fences, improvements, etc., are declared to be real property (R. L. Sec. 1214) while leaseholds, chattel interests in land and growing crops are declared to be personal property. (R. L. Sec. 1215). An exemption of "land" would thus exempt both statutory real and statutory personal property, and conversely the proviso in question cuts into both classes and limits the exemption of leaseholds and growing crops equally with fee simple lands.

The conclusion of the court in the main decision is awkwardly expressed, but unless the words "other than land" be held to modify "all personal property" as well as "all real property" it could be equally well argued that a thousand acre leasehold had been decided to be exempt as coming within the term "all personal property" defined by the statute. All ambiguity may be removed by the explanation that "other than land" was intended to modify all personal property as well as all real property, and that the word "land" includes leaseholds, chattel interests in land, and growing crops, though declared by the statute to be personal property, equally with fee simple lands, buildings, fences, improvements, etc., declared by the statute to be real property.

In re Taxes, Pineapple Companies, 19 Haw. 230.

The motions for judgments are granted as presented and the assessments fixed as follows: Wahiawa Consolidated Pineapple Company, Ltd., \$88,875; Hawaiian Pineapple Company, Ltd., \$118,094.93; Pearl City Fruit Company, Ltd., \$49,995.00; Honolulu Packing Company, Ltd., \$23,125.00; Haiku Fruit & Packing Company, Ltd., \$21,431.45.

W. L. Whitney, Deputy Attorney General, for the tax assessors.

L. A. Thurston and A. Perry for taxpayers.

IN THE MATTER OF THE ESTATE OF C. AHI,
DECEASED.

APPEAL FROM FIRST CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 5, 1908.

ARGUED NOVEMBER 13, 1908.

DECIDED NOVEMBER 16, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

JURISDICTION—*probate court—contempt.*

A judge in probate has statutory authority (Sec. 1648 R. L.) to compel an administrator to obey an order to pay a creditor a dividend of forty per cent. as paid other creditors, although the administrator has been discharged on a hearing of his petition for allowance of final accounts and discharge, at which hearing the creditor was not present not having received notice of it and his claim not having been considered.

Enforcement by contempt proceeding of the administrator's official duty to make such payment is not within the prohibition in the Organic Act (Sec. 10) against imprisonment for debt.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal from an order of March 11, 1908, adjudging the appellant, William L. Whitney, who was appointed

Est. of Ahi, 19 Haw. 232.

administrator de bonis non Sept. 3, 1902, and upon his own petition discharged December 11, 1906, guilty of contempt of court and committing him to the custody of the high sheriff for failing to obey an order of George D. Gear, Second Judge of the First Circuit Court, of June 10, 1904, requiring him, as administrator, to pay \$870.90 to M. B. Silveira and Silveira & Co. as and for forty per cent. of their claim against the estate. The order appealed from was made after hearing upon the motion of these claimants filed January 29 last, with an affidavit of their agent Bolte that although demand had been made on Whitney to pay said sum pursuant to the order he had failed to do so. In September, 1903, the administrator had paid the other creditors forty per cent. and estimated that forty per cent. of this claim was \$642 which was tendered by him and refused by Bolte on the ground that under certain agreements with the two administrators the percentage would amount to \$870.90. Bolte thereupon brought a petition before Judge Gear that the administrator be ordered to pay the \$870.90. After a hearing, the administrator appearing in person as well as by attorneys, the order of June 10, 1904 was made. It appears from the administrator's final accounts on file that at that date the administrator, having distributed the money on hand by payment to the other creditors of forty per cent., had \$817.38 which by October 10, 1906, was increased to \$1769.38 by receipts from rents, costs returned and settlement of the Ross claim. This sum was reduced by payment of rent (\$250), water rates (\$66.55), collector's commissions (\$161.90), taxes (\$130), insurance (\$51), costs (\$37), garbage (\$2.25), rake (\$.50), in all \$699.20, which left 1070.18 which the administrator used for his commissions (\$981.68) leaving \$88.50 balance. His final accounts were filed October 20, 1906, with his petition for their allowance and for his discharge which was granted by an order of December 11, 1906, after three weeks' publication of

Est. of Ahi, 19 Haw. 232.

notice and a reference of the accounts to Job Batchelor, clerk of the court.

The appellant claims that the order adjudging him guilty of contempt and committing him to custody for nonpayment of the money pursuant to the order of June 10, 1904, was void on the grounds: (1) the Bolte claim was not presented to the administrator and action brought upon it within two months after its rejection as required by Secs. 1851, 1853 R. L.; (2) even if the claim had been presented the administrator had a right under the common law in force in the Territory to prefer one class of creditors over any other and by paying more to other creditors he would not be liable to these; (3) the settlement of his accounts and final discharge is a judgment conclusive on persons interested in the estate and duly cited in the proceeding upon all matters involved in the account and passed on by the court, which judgment cannot be collaterally impeached by a proceeding of this nature; (4) the administrator having been discharged the court had no jurisdiction over the defendant even if it could be had by setting aside the order of discharge; (5) the order of Judge Gear was void, the court having no authority to try and determine disputed claims; (6) the order should be taken to have been made under the implied condition that funds sufficient would first come into the hands of the administrator or else it is an order reviewable on final accounting when all parties are before the court; (7) the claim is that of a money obligation and debt within the meaning of the Organic Act providing (Sec. 10) that no person shall be subject to imprisonment for nonpayment of taxes nor for debt.

The question of greatest difficulty in the case is the validity of the order of the circuit judge directing the administrator de bonis non to pay to Silveira and Silveira & Co. \$870.90 as and for forty per cent. of their claim.

Est. of Ahi, 19 Haw. 232.

On the one hand the circuit judge has statutory authority to compel executors, administrators and guardians to perform their trusts and to account in all respects for the discharge of their official duties. R. L. Sec. 1648. On the other hand is the well recognized principle that in the absence of statute a probate court has no jurisdiction to pass upon disputed claims against the estate. *Estate of Hana*, 4 Haw. 499. An order to pay a claim against the decedent duly rejected by the administrator would be clearly outside the jurisdiction of the circuit judge, while an order to pay an undisputed claim asked on account of the unreasonable refusal or delay of the administrator would be within the statutory authority, the word "trusts" being obviously not confined to the technical relation of trustee and cestui que trust but descriptive of the fiduciary duties of executors, administrators and guardians.

The creditors' claim in this instance had originated from the fact that the decedent had been their tenant under a lease. The buildings on the land had been burned in the fire of January, 1900, started in another locality for the destruction of some infected buildings, and there was pending a fire claim before the government in the name of C. Ahi in which the estate was interested to the extent of the leasehold value of the buildings and the Silveiras to the extent of the reversionary value. The first administrator, C. H. W. Ahi, settled the claim and cancelled the lease by an agreement to pay the sum of \$2558.80 as the back rent to that date, the Silveiras agreeing to allow the estate five-twentysevenths of the fire claim, this amount, however, to be reduced proportionately if their claim for rent was not paid in full. The second administrator, acting as he claims in ignorance of the agreement of his predecessor, made an assignment of the fire claims to the Silveiras in consideration of their promise to pay the lump sum of \$381.50 out of the moneys received. The fire claims having been paid the question arose whether, under these agreements,

Est. of Ahi, 19 Haw. 232.

the dividend of forty per cent. which had been paid to the other creditors was in this instance subject to a set-off of the entire \$381.50 in favor of the estate or to a set-off of only forty per cent. of that sum. The administrator took the first position and tendered \$642, which the creditors' agent refused, and after some delay filed the petition which led to the order under consideration.

Jurisdiction of the circuit judge to hear and determine the matter in question must be judged by the allegations of that petition. Van Fleet, Collateral Attack, Sec. 60. The petition sets out the agreements and alleges that under them the estate is indebted in the sum of \$2558.80 subject in the event of full payment to a deduction of \$381.50; that the administrator is prepared to pay forty per cent. of the claims against the estate; that forty per cent. of petitioners' claim is \$1023.50; that the administrator claims the right to deduct the sum of \$381.50 and has tendered the balance of \$642, but that petitioners claim that he should deduct only \$152.60 and that he should be ordered to pay the balance of \$870.90, with a prayer accordingly.

This is not a disputed claim against the estate. That is admitted to be \$2558.80 less a deduction of \$381.50. Had the creditors sought to recover at law the judgment could have been only for the full balance, and evidence of the present ability of the estate to pay forty per cent. and the probability or improbability of future dividends would have been inadmissible in such an action. The question before the circuit judge was not as to the amount which was ultimately due to the Silveiras but solely as to the amount which the administrator should pay at that particular time to put these creditors on an equality with the others who had been paid. It was no bar to further applications of the same nature, involving a recomputation of the deduction, in case the estate should ever be in position to pay further dividends. It was an order

Est. of Ahi, 19 Haw. 232.

incidental to the proper administration of the estate and as such was within the statutory power of the circuit judge.

Upon contempt proceedings for the disobedience of an order of court, valid and unrevoked, we can consider no objections to that order which do not go to the jurisdiction of the court. If the order is erroneous in any particular the remedy is by appeal or by direct proceeding of some other nature, not by disobedience. If, as is now contended, the written agreement with the administrators should have been presented as if it were a claim against the decedent; if the administrator had overestimated the amount which the estate could pay; if his calculations had been disturbed by the payment of the Quai Far claim; if he claimed that he had the right to prefer other creditors and leave this claim unpaid; if the order should not have been absolute but conditional upon his having sufficient assets over and above his commissions and attorneys' fees, all these claims were either available at the time or should have been brought to the attention of the circuit judge as soon as available as grounds for the modification of the order. They are not defenses in this proceeding.

So far as the defense of subsequent discharge as administrator is concerned, we cannot regard the order of discharge as a direct revocation of the order to pay this claim, particularly as the petition for discharge recited that the administrator had complied with all orders of court and no mention of this claim was made in the accounts filed.

The settlement of an administrator's final accounts, unless corrected on motion by the probate court or on petition by a court of equity, concludes persons interested in the estate who appear or to whom notice was given upon matters involved in the accounts and passed upon by the court; but here there is nothing to show that the attention of the court was called to the nonpayment of the \$870.90. It has never been held in this jurisdiction that an order approving an administrator's final

Est. of Ahi, 19 Haw. 232.

accounts has the effect of an adjudication upon the claim of one who did not appear at the hearing and had no notice of it, and where the claim was not heard or passed upon.

A decree of distribution does not bar an adverse claim by one who had not proper notice to appear. *Mikalemi v. Luau*, 6 Haw. 47. "The general rule is that a judgment is void as to one entitled to be heard who had no notice, actual or constructive." *Mossman v. Hawaiian Government*, 10 Haw. 421. There is no statutory authority for notice by publication of hearings of administrators' petitions for allowance of final accounts and discharge, and in the absence of statute constructive notice by newspaper publication, is not sufficient. 2 Woerner Adm. Sec. 571; *Butterfield v. Smith*, 101 U. S. 570; *Griffith v. Godey*, 113 U. S. 93; *Smiley v. Cockrell*, 92 Mo. 111; *Ruth v. Oberbrunner*, 40 Wis. 238.

Bolte testified that he had no notice of the hearing and the administrator's statement that he told him that the accounts had been referred to Batchelor, although this is denied by Bolte, would not be sufficiently definite to constitute notice of the order setting the time and place for hearing the administrator's petition for discharge. As it does not appear that this claim was considered at the hearing on the final accounts the claimant has some remedy to recover what was payable on his claim, and the enforcement of the outstanding order by contempt proceedings is an appropriate remedy.

The statutory power of a judge in probate to compel an administrator to perform his trusts and to account in all respects for the discharge of his official duties is the same as the compulsory power of equity to enforce its decrees and is not within the prohibition against imprisonment for debt. *Mueller v. Nugent*, 184 U. S. 1.

Order affirmed.

Castle & Withington for appellant.

A. G. M. Robertson for appellees.

McCandless v. Honolulu Plantation Co., 19 Haw. 239.

L. L. McCANDLESS v. HONOLULU PLANTATION
COMPANY AND WOODLAWN FRUIT COMPANY,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCT. 5 AND NOV. 14, 1908.

DECIDED NOVEMBER 16, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

APPEAL AND ERROR—*findings in jury waived cases.*

The findings of fact of a circuit court in a jury waived case cannot be reversed on exceptions where there is evidence on both sides and the issue turns upon the credibility of the witnesses.

EJECTMENT—*title from common source.*

When it appears in an action of ejectment that both parties claim title from the same grantor neither can take advantage of alleged defects in the chain of title prior to the common source.

APPEAL AND ERROR—*general exception.*

A general exception to the decision of a court, jury waived, finding for the plaintiff, does not bring to the consideration of this court a possible defense disclosed by the evidence but not called to the attention of the trial court.

OPINION OF THE COURT BY BALLOU, J.

This is an action of ejectment for a small kuleana situated at Halawa, Oahu, in which, after a trial before a judge of the circuit court of the first circuit, jury being waived, the plaintiff obtained judgment for the restitution of the land with costs. Both parties claim under S. Kamaka, the defendants also claiming by adverse possession. The plaintiff's deed from Kamaka is dated September 17, 1901, and recorded September 24, 1901. This action was instituted February 7, 1902. At that time the defendants were in possession of the land but under a title not now relied upon. On August 5, 1902, there was placed on record a hitherto unrecorded deed of the property in question

McCandless v. Honolulu Plantation Co., 19 Haw. 239.

from S. M. Kamaka to James I. Dowsett dated January 13, 1883, and on August 27, 1902, one of the defendants obtained a lease of the property from The Dowsett Co., Ltd., successors in title of James I. Dowsett.

The main controversies in the case related to the authenticity of the deed from S. M. Kamaka to J. I. Dowsett and to the question of adverse possession. Upon the first point the testimony was conflicting. Kamaka, now blind and a leper on Molokai, denied that he had ever executed the deed to Dowsett or that he ever signed his name S. M. Kamaka, and at the close of the defendant's case the deed of 1883, which had been admitted in evidence conditionally, was struck from the evidence upon motion, the trial judge ruling that it had not been proven to be Kamaka's deed. To strike the deed from the evidence entirely was technically error, as not only were there many improbabilities and inconsistencies in Kamaka's story to affect his credibility, but there was considerable circumstantial evidence in support of the execution of the deed which should have gone to a jury had there been one. But we cannot hold this prejudicial when the trial judge himself was the judge of the ultimate facts, and the question being mainly that of the credibility of a witness we would not be justified in reversing the judgment upon this ground.

Nor is there anything in the record which would justify a reversal of the judgment on the ground that adverse possession had been established. The evidence shows that Kamaka had exercised no possession or control over the land for more than the statutory period, but this is by no means decisive. The evidence as to the beginning of the possession of tenants claiming under Dowsett is uncertain as to dates, and in so far as it is sought to fix the time prior to 1883 is inconsistent with the theory of Dowsett's acquisition of interest at that time. A lease from Dowsett to Akeni and John Nui dated January 1, 1891, was introduced in evidence, the description in which

McCandless v. Honolulu Plantation Co., 19 Haw. 239.

reads: "A certain piece of land at Halawa, Oahu, (situated within the limits of the old enclosure of the taro land of Halawa), and containing about nine acres." This description was of land in the vicinity owned by Dowsett and would probably include apana 2 of the kuleana in question, with an area of 1.09 acres, if Dowsett owned or claimed it. Giving full weight to the defendants' evidence, we find that Akeni, one of the original lessees, occupied the premises in dispute together with the surrounding property of Dowsett under this lease. After his death in 1893 or 1894 his wife, previously divorced and remarried, took possession, claiming under Dowsett, and occupied it together with Akeni's minor children. The question of continuity of adverse possession between two successive lessees each occupying premises not owned by the lessor under whom they claim is largely a question of fact, it being incumbent on the defendants to prove actual or constructive delivery of possession of the property from one to the other. *Wilder v. Macfarlane*, 18 Haw. 121. In 1898 the defendants took possession of the land claiming under title not derived from Dowsett, the lease from The Dowsett Co., Ltd., of this date covering only leasehold interests in land owned by the Bishop Estate. The ouster of Dowsett's tenant was a separate act of disseisin, and obtaining Dowsett's claim four years afterwards does not enable them to tack their possession to the prior possession of Dowsett's tenants. The court's general finding is sustained by the evidence so far as the defense of adverse possession is concerned.

The defendants' claim of a missing link in plaintiff's title prior to the time of Kamaka's ownership cannot be sustained. While it is the general practice in this jurisdiction for the plaintiff to deduce his title from the original land commission award, yet when it appears, as here, that both sides claim from a subsequent common title it is unnecessary to consider any defects in the chain prior to the common source. *Gaines v.*

McCandless v. Honolulu Plantation Co., 19 Haw. 239.

New Orleans, 6 Wall. 642, 715; *Bonds v. Smith*, 106 N. C. 553. It is not necessary to pass upon the exception to the refusal to admit in evidence Kam Yet's declarations as to the fact that he was holding the land under Dowsett, the error, if any, being harmless, as if that fact were admitted the result of the claim of adverse possession would be the same.

After the case had been submitted the court requested further argument as to whether, assuming that the deed of S. M. Kamaka to J. I. Dowsett in 1883 was not executed by the then owner of the land, the defendants or their lessor are in the position of a mortgagee in possession of the land and whether ejectment could be maintained against the tenants of a mortgagee in possession by a grantee of the mortgagor. The reason for the request was that a mortgage from Kamaka to one William Dean and an assignment thereof to James I. Dowsett, under whom the defendants claim, appear on the record of the case. After argument, however, we are satisfied that the defense, if good, is not available in this case. The only exception under which it could have been raised is the general exception to the judgment and decision as contrary to the law and the evidence, and this exception is too general to bring to this court a question of law which has not been called to the attention of the court below and made the subject of a ruling. *Territory v. Puahi*, 18 Haw. 649. In *Kalaeokekoi v. Wailuku Sugar Co.*, 18 Haw. 380, a different question was presented, as the plaintiff had an exception under which the newly discovered point could be urged.

The exceptions are overruled.

A. G. M. Robertson for plaintiff.

M. F. Prosser and R. B. Anderson (Kinney & Marx on the brief) for defendants.

Martello v. Martello, 19 Haw. 243.

ROSE COUTA MARTELLO v. ANTONE MARTINES
MARTELLO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 14, 1908.

DECIDED NOVEMBER 16, 1908.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

DIVORCE—*jurisdiction*.

A libel for divorce cannot be brought in a circuit other than that in which the parties last lived together as man and wife, notwithstanding a waiver of all jurisdictional objections.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal from a decree dismissing a libel for divorce for desertion and failure to provide. The libel, which was brought in the first circuit, does not show where the husband and wife last lived together but the decision finds that it was at Onomea, Hawaii, which is in the fourth circuit. The husband's answer waives all right he might have to object to the jurisdiction of the court to try the suit and consents to its being tried at any time after the filing of the answer. By Sec. 1648 R. L. circuit judges at chambers have jurisdiction in divorces which is limited by Sec. 1649 which provides that causes of divorce "shall be triable only in the circuit where the parties last lived together as man and wife, or, if they have not so last lived together in this Territory, in the circuit in which the applicant resides." Sec. 2229 gives exclusive original jurisdiction to the "circuit judge or judges severally of the circuit in which the parties shall have last lived together as husband and wife." The libellant's brief refers to the statute (Sec. 1647) which allows a circuit court in its discretion, upon consent of all parties, to change the venue, but no change of venue was made or asked in this case. It is con-

Martello v. Martello, 19 Haw. 243.

tended that "where the plaintiff brings suit in the wrong venue such suit may be tried there provided the defendant does not object to the venue, as the venue is merely laid for the convenience of the parties," and that a "requirement that suits in federal courts shall be brought in the district where the defendant lives confers an exemption in the nature of a personal privilege that may be waived." *Central Trust Co. v. McGeorge*, 151 U. S. 129, cited in support of this contention, holds that where a defendant corporation voluntarily submits itself to the jurisdiction of a circuit court of the United States by pleading to the merits this is a waiver of its privilege of being sued in the district of its domicil, citing, besides several other cases, *Ex Parte Schollenberger*, 96 U. S. 369, in which it was said, "The act of Congress prescribing the place where a person may be sued is not one affected by the general jurisdiction of courts." Our statute, however, not only prescribes the circuit where the libel for divorce may be brought but prohibits the trying of a libel in any other circuit than that in which the parties last lived together as man and wife, and allows divorce cases to be brought in no other circuit.

The judge was right in refusing to exercise by consent of parties jurisdiction not conferred by law, and in considering that in divorce cases the plaintiff and defendant are not the only interested parties but that the state is interested.

Decree affirmed.

T. M. Harrison for libellant.

No appearance for libellee.

NO. 19. CARL WALDEYER v. WAILUKU SUGAR Co. Appeal from circuit court, second circuit. Argued November 16, 1908. Decided November 16, 1908. Hartwell, C.J., Wilder and Bailou, JJ. This is an action at law in the circuit court of the second circuit in which defendant's motion for a continuance was

Waldeyer v. Wailuku Sugar Co., 19 Haw. 244.

denied. The circuit judge deeming it advisable for a more speedy termination of the case allowed an interlocutory appeal to this court from his ruling and certified up to the same. Plaintiff moves that the appeal be dismissed on the ground that no appeal lies under the statute, R. L. Sec. 1864, which provides as follows: "Bills of exceptions * * * * may be certified to the supreme court from decisions overruling demurrers or from other interlocutory orders, decisions or judgments whenever the judge in his discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to certify an interlocutory bill of exceptions to the supreme court shall not be reviewable by any other court." Defendant concedes that the only method by which the action of the court complained of may be reviewed is by exceptions, but claims that the certificate of appeal sufficiently sets out the exception in question and that it may properly be considered by this court as a bill of exceptions.

Per curiam: There is no doubt that the ruling in question cannot be reviewed by appeal. The certificate of appeal is not and does not purport to be a bill of exceptions, and consequently cannot be considered as such. A majority of the court think that the motion should be granted and it is so ordered.

R. P. Quarles for plaintiff.

W. A. Kinney and *R. B. Anderson* for defendant.

CARL WALDEYER v. WAILUKU SUGAR COMPANY,
LTD.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED NOVEMBER 19, 1908.

DECIDED NOVEMBER 20, 1908.

HARTWELL, C.J., WILDER, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF BALLOU, J.

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

CONTINUANCE—*abuse of discretion.*

An order denying a motion for a continuance will not be reversed unless, as does not appear in this case, an abuse of discretion is shown.

STATEMENT OF THE CASE.

The plaintiff brought his action to recover damages for several breaches or violations of the terms of two separate tunnel contracts made with him by the defendant, the sum of \$24,975 being demanded as damages for certain alleged violations of the terms of the contract of February 15, 1905, and the sum of \$10,404,86 for certain alleged wrongful acts of the defendant in relation to the contract of March 1, 1905. The defendant's motion for a continuance on the ground of the absence of material witnesses being denied the defendant excepted to the ruling and was allowed an interlocutory bill of exceptions. The motion was supported by the affidavits of C. B. Wells, manager of the defendant company until October 31, that he had full control and charge of the transactions between the defendant and the plaintiff, and that he had not prepared to meet litigation out of the first contract because he understood that the second settled all claims under the first contract, and that he was surprised by a letter from the plaintiff about the close of August presenting an enormous claim for damages against the defendant for breach of the contract, which letter was immediately placed in the hands of Messrs. Kinney & Marx, whose senior member, W. A. Kinney, had represented the defendant in all matters concerning the contracts, authorizing the firm to take all necessary steps to meet the claim, although no suit, was then brought, and it was uncertain when it might be brought; that he notified the defendant's present manager, Penhallow, then assistant manager, on a vacation at the coast, to hunt up witnesses on the coast who were in Wailuku when the first contract was being carried out and had work-

Waldeyer v. Walluku Sugar Company, 19 Haw. 245.

ed upon it under the plaintiff, and also to meet Kinney on the coast, where he was then due to arrive shortly and get his assistance in carrying out the instructions; that a number of witnesses known to him whose evidence was material and necessary for the defense were as yet not located, although strenuous efforts had been made to secure them, but there was every reason to believe that they would be located within a reasonable time, and that the failure to get hold of all the evidence necessary was wholly due to the plaintiff's delay in bringing the suit, and that the time from the plaintiff's demand was wholly too short to secure the necessary evidence, scattered as it was in Japan, on the coast and elsewhere, and that the time until the next term would not be too long by due diligence to secure the witnesses in deposition form and ready for trial, with further immaterial averments as to plaintiff's having harassed and annoyed the affiant by suits;—of W. A. Kinney, of the firm recently of Kinney & Marx, and now Kinney, Marx, Prosser & Anderson, to the effect that his firm was retained by the defendant in an arbitration suit with the plaintiff relating to differences between the parties under another tunnel contract between them, and that at the hearing at the arbitration there was valuable evidence, particularly from the plaintiff, having a vital and pertinent bearing on many of the issues in the present action; that the arbitration matter was settled and that no transcript of the testimony was called for as it was not anticipated that the plaintiff would bring any further suit on said contract; that the affiant was the only member of his firm conversant with the arbitration proceeding; that he left Honolulu on business for Boston on September 8, being furnished just before leaving with the plaintiff's demand foreshadowing this action, and that although not certain that the suit would be brought he made inquiries in San Francisco for collecting evidence upon the subject, and particularly as to the whereabouts of one Halverson, who for about a year had charge in

Waldeyer v. Walluku Sugar Company, 19 Haw. 245.

the plaintiff's name of the performance of the first contract, and saw Halverson and obtained from him much valuable information on the issues raised by the plaintiff's demand; although affiant did not learn that the suit was brought until his return to Honolulu October 23, his trip to Boston being exclusively for professional engagements in matters pending before courts in Massachusetts affecting the interests of clients in Hawaii; that upon returning from Boston he saw Halverson again in San Francisco, and then learned that means had been found to locate a large number of Japanese, ten or twelve in number, who worked under plaintiff and under Halverson in performing the original contract, and that he thereupon retained McClanahan & Derby in San Francisco to represent the defendant, instructing them to proceed forthwith to locate the Japanese and take their depositions; that in order to furnish data for McClanahan & Derby's search for evidence from the Japanese it was necessary to furnish them with the evidence taken before the board of arbitration; that upon returning to Honolulu affiant found that the transcript of the evidence had been ordered and was shortly to be completed, whereupon copies of plaintiff's complaint and the transcript were got away by the first mail after the transcript was furnished by the stenographer and has probably reached McClanahan & Derby; that affiant had for some years acted as defendant's counsel prior to the formation of his partnerships, and was cognizant from time to time of the matters of the contracts between plaintiff and defendant arising out of the said two contracts; that he was counsel for defendant in drawing the contracts, both he and the defendant understanding that the second superseded the first contract so that the plaintiff's claim was a surprise and no preparation had been made by him to prepare for it; that nearly four years have passed since the first contract and most of the witnesses to the issues thereunder are scattered in foreign countries, many of them having been completely

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

lost sight of, all or many of whom are vital and important witnesses for the defense; and that it would be unsafe for the defendant at this time to proceed to trial without securing evidence of a number of them, including the evidence of Halverson and the Japanese located in California as well as one Honda who had been subpoenaed in the cause and in violation of the subpoena left the Territory for Japan, and also the testimony of one McCann, formerly of Lahaina, well acquainted with the plaintiff's business methods, ability and record as a tunnel man and contractor; that the defendant's officers, as the affiant is informed and believed, have credibly been informed that the plaintiff's tunnel plan and appliances under the original contract were inadequate for the work called for by it and not such as it required of the plaintiff, but that sufficient time has not been given to counsel or the defendant to secure and prepare expert evidence to establish that fact, which evidence would have to be obtained partly at the coast from men skilled in making and using tunnel machinery and appliances, and that to secure the evidence it would be necessary to have a detailed description of plaintiff's appliances and also personal inspection by the experts; that it is customary for the affiant's firm to have engagements blocked out from two to three months ahead, and that when this suit was brought fully two months' work had been provided for, the affiant and his partner, Mr. Prosser, being now due in Honolulu on November 16 by positive engagements for the trial and defense of one Koki in the federal court on a charge of embezzlement, which trial in all probability would take a month, and that then the affiant and said Prosser as well as his partner Anderson had several months' work accumulated and for trial in the first circuit court, and that an unusual length of time would be required to prepare for trial in this cause by reason of the plaintiff's laches in delaying it until witnesses were scattered thousands of miles away; that all of the witnesses would give vital and material

Waldeyer v. Walluku Sugar Company, 19 Haw. 245.

evidence if called at the trial; that Halverson would testify, among other things, that the plaintiff was wholly incompetent and unable to carry out the original contract and had failed to perform the same and was in default when the plaintiff and his bondsman called in Halverson to perform the contract for them; that when he took charge all the men had deserted the tunnel work and plaintiff was unable to get them back because he had fraudulently and unfairly appropriated money furnished him by defendant to pay the men, which he had failed to do, and moreover that the plaintiff was so abusive and violent at times to the men that they did not care to work under him, with further details as to the testimony which Halverson would give.

An affidavit was also filed by the defendant of M. F. Prosser that the papers first served on the defendant did not purport to be certified copies and that he notified the plaintiff's attorney of the mistake, and that he did not desire to take advantage thereof and move to quash as he might have done; that the action was commenced during the absence of Kinney, the senior member of the firm, who was thoroughly conversant with the matters relating to the parties; that about October 15 he learned that one Honda was a necessary and material witness for the defendant, without which the defendant could not safely go to trial; that Honda was in Honolulu and affiant caused him to be served with a subpoena to be present at this term of court as a witness for the defendant; that Honda told the affiant that he was a contractor for tunnel work for the defendant at the same time when such work was being done by the plaintiff and under similar conditions except that Honda got only four dollars a foot while the plaintiff was getting five dollars; that the plaintiff, owing to inability to carry out his contract and his unfair methods to the men was in constant trouble with them so that he was unable to carry out the terms of his agreement with the defendant, and that by unfair methods of

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

treating the labor and failure to pay them what they had earned the plaintiff had acquired such a reputation among the Japanese laborers that he could not obtain them at any price, and therefore his work was greatly delayed and unskillfully performed to the great loss and annoyance of the defendant, and that Honda's evidence as well as that of the Japanese, whose names are unknown to the affiant, referred to in Kinney's affidavit as in California, is material and necessary to prove that the defendant's breaches of the contract did not occur; that the affiant notified plaintiff's counsel shortly after arrival at Wailuku about October 26 that it would be impossible for the defendant to get to trial at this term for the reason stated in the affidavits of himself and W. A. Kinney. The plaintiff filed objections to the motion on the ground that the affidavits do not show grounds for a continuance, that the facts expected to be proved by the witnesses are not set forth with sufficient particularity and instead of stating facts mere conclusions are stated therein; that the affidavits do not show that the evidence of said absent witnesses is not cumulative or could not be proved by other witnesses within reach, and fail to show due diligence to obtain their evidence by deposition or otherwise, and show that the witnesses whose evidence is sought are beyond reach by process, and with the exception of Halverson, whose deposition could be procured within the two months since service of summons, are unknown to the defendant. The plaintiff filed his own affidavit to the effect that the deposition of Honda could have been obtained with reasonable diligence; that many of the Japanese who worked with Honda and for the plaintiff and under Halverson are now on Maui and other islands in the Territory; denies that delay in bringing the action was due to motives assigned to him in Well's affidavit; that he would have brought the action sooner if it had been convenient and practicable for him to do so; that the matters involved in the arbitration are different from those involved

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

in this action and arose under a different contract; that the defendant was informed soon after the end of the arbitration proceeding that the plaintiff intended to bring this suit for damages. Other matters irrelevant to the issue are also set forth.

Lightfoot's affidavit was also filed by the plaintiff to the effect that Prosser, one of the defendant's attorneys, told him about October 23 that the defendant's cases were ready for trial and its attorneys would insist upon immediate trials and not consent to continuances but oppose applications for continuances, but October 30 Prosser told him that the defendant would be unable to proceed to trial in this case at the present term; that there was ample opportunity to take Honda's deposition both in Wailuku and Honolulu.

W. A. Hardy's affidavit was also filed by the plaintiff that he was employed by the plaintiff in the Waihee ditch tunnel as foreman during a large portion of the time that Halverson was there, and that many Japanese laborers working there are now on Maui. The plaintiff also filed his statement that he admitted that Honda if present would testify to all the facts which the affidavit of Prosser shows that he would testify to, and that Prosser's affiant (affidavit) might be read in evidence in so far as it showed what Honda's evidence would be and to have the same effect as if testified to in court. Also that the witness Halverson if present would testify to the fact as set forth in Kinney's affidavit as Halverson's evidence, and that Kinney's affidavit, so far as it sets forth what Halverson's evidence would be, may be read as the deposition and evidence of Halverson at the trial.

Counter affidavits were filed by the defendant of Penhallow going further into statements made to him by Halverson and of Wells that he could not except in a general way give statements made by witnesses to him, but that he knew that they would testify as claimed by him; that Halverson's evidence would not be cumulative since he would testify to conversations

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

with the plaintiff and to matters and things coming to his knowledge as foreman in charge of the ditch tunnels part of the time covered by the complaint, and that during Halverson's employment he was the only person familiar with the English language employed there and was a person of intelligence whose evidence would be received with respect and carry great weight, and that he only could testify to conversations had with or directions given by the plaintiff concerning the work; that he was anxious to go to trial at this term but yielded to advice of counsel that he could not safely do so, and further as to conversations with Honda and the affiant's surprise to hear of Honda's contemplated departure so that he had only time to notify his Honolulu agents twenty-four hours before Honda left the island (of Maui) on his way to Japan, and further that Honda as a contractor of similar tunnel work would testify that he had often visited plaintiff's tunnels and was familiar with his methods during times not covered by Halverson's evidence. Other facts bearing upon the case are mentioned in the opinion of the court.

ORAL OPINION.

HARTWELL, C. J. A statement of the case will be filed later and the court does not for that reason delay to announce its decision now, which is that it is unable to find legal grounds for reversing the ruling of the judge denying the defendant's motion for continuance. (Statement appended.)

In cases where it is claimed that there was abuse of discretion it is sometimes possible and sometimes it is impossible to lay down clearly defined rules to control an appellate court. Definitions of abuse of discretion are frequently found. That of Chief Justice Marshall adopted in *People v. Vermilyea*, 7 Cow. 369, is a fairly exact definition although not covering all the cases of abuse of discretion. Disregarding known rules of law on any subject on which there are known rules would be error whether called abuse of discretion or not.

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

A continuance is frequently a matter of common right irrespective of any statute or rules of court and a disregard of the right by refusing a continuance would be an abuse of the discretion to postpone the trial. Take, for instance, the case of the death or sudden illness of a material witness. It is seldom that counsel would resist a continuance for that cause, but it would be a matter for consideration whether the evidence was available from another source and was merely cumulative. A question of law might arise on the ground that the evidence which the witness should have given is merely cumulative to other evidence shown to be available. The appellate court could say whether it was or was not so and there is no discretion in the determination of the matter. In this case the court denied the motion on the grounds substantially that due diligence had not been shown by the defense; that the noncumulative evidence sought was admitted by the plaintiff and that the evidence not admitted and not available was merely cumulative.

A great deal is said and ought to be considered concerning the effect of the personal attendance of a witness in place of an admission by opposite counsel that he would testify as claimed. We all understand the advantage of having a good witness before the jury, and yet the practice appears to be that if it is admitted that he would testify as claimed and that the jury might consider the evidence as if presented by the witness that is sufficient to require the trial to go on.

We are unable to find any capricious or arbitrary disregard of any general principles of law in refusing the defendant's motion, and, to illustrate this fact, I am allowed by Mr. Justice Wilder to say that he considers that if the motion had been before him he would not have been justified in granting it. On the other hand, I am authorized by Judge DeBolt to say that he would have granted the motion and I am inclined to think that I should have done so. It appears to all of us that there has been no lack of good faith on the part of the defend-

Waldeyer v. Walluku Sugar Company, 19 Haw. 245.

ant or any of its attorneys. I was much impressed by Mr. Kinney's showing of the importance of full and thorough preparation of a defense in such a case and of not coming into it in a slipshod, haphazard way; but, as he remarked, different counsel would look upon the matter differently. One would rely more upon a legal defense and take less care to obtain an elaborate defense on the facts than another would; in other words, one is more cautious than another may be. Now I have great respect for the habit of elaborate preparation. It is expensive frequently in time, money and effort, but it tells undoubtedly as any of us know who have had long practice at the bar. If the senior counsel for the defendant had been here when service of the complaint was made, with his methods, which we all understand, of elaborate preparation, he would not have neglected any opportunity available to obtain the showing he now seeks to obtain for the defense if he then desired the continuance; but he was absent and did not return for fifty-three or fifty-four days after the service. Who was to suffer for his absence? It is the general understanding, I believe, that engagement of counsel in other cases in other courts is not an excuse for granting continuances; if it were where would parties litigant be? The senior counsel stated very vividly where they would be when he said that if counsel in fifteen or twenty cases, equally important, had to show due diligence and be ready for trial in all of them at the same time an impossibility would be required. Of course it would be. This would mean that the plaintiff or the defendant, as the case might be, would have to await his turn until other cases in which the same counsel were engaged had received his attention. The excuse is properly not recognized.

What the defendant could have done upon service of the complaint is not for this court to say, but it is clear to us that the absence of its senior counsel is cause of the continuance being asked and that it would not have been required if he

Waldeyer v. Wailuku Sugar Company, 19 Haw. 245.

had been here giving his professional attention to the matter from his point of view. It was not until November 5, a considerable time after the term opened on October 21, that counsel felt that the continuance was requisite,—for what reasons it is not for this court to say. It appears from the affidavit of the defendant's former manager, Wells, that he wanted the trial at this term, being about to go away for a foreign trip, and that counsel had not decided to ask a continuance when one of them at the opening of the term told the plaintiff's attorney that they should insist on going to trial. It might well have been a question of balancing the advantages and disadvantages of a trial in the absence now of a principal witness or in the possible absence of Wells at the March term. What was in the mind of counsel we cannot say, but we know that after service of the complaint September 10, the answer being due September 30, on September 29 twenty days' extension of time to answer was requested by the defendant's attorneys and agreed upon by the plaintiff, the order extending the time being made September 30; that the answer due October 20, under the order extending the time, was complied with by filing the answer October 19, and that no suggestion of a continuance was made until the filing of this motion November 5; that Mr. Kinney left Honolulu September 8 and returned October 23, presumably leaving San Francisco October 16 or 17.

It may be that some of the grounds on which the court denied the motion present questions of law which we could consider and if we did not agree with its view of them we could reverse his order, as, for instance, on the subject of cumulative evidence; but due diligence is in many cases one of those general terms difficult to bring within any rules of law. The fact that the judge exercised his discretion without any apparently improper motive or from caprice, but upon consideration, as far as we can say, of the facts, makes it impossible for this court to say that he abused the discretion, no matter what any

Waldeyer v. Walluku Sugar Company, 19 Haw. 245.

one of us would have done if the case were before us in the first instance.

Upon the undisputed facts we could not say that the judge abused his discretion, but, going further, what right have we to say that he believed the affidavits on the one side or those upon the other. I quite believe the statement of Mr. Kinney that he considered further time to be necessary for the defense and that a transcript of evidence before the arbitrators was needed in order to prepare interrogatories for Halverson. The trial court may have thought otherwise. How do we know what he thought, as his ruling was based partly upon his view of the facts and partly upon his view of the law?

As to the authority of this court to review exceptions to granting or refusing a continuance, *Queen v. Ah Kiao*, 8 Haw. 467, affirms the jurisdiction in cases showing an abuse of discretion. The same position, after several previous decisions declining to consider such exceptions, is taken in *Isaacs v. U. S.*, 159 U. S. 489. Earlier decisions, beginning with *Woods v. Young*, 4 Cranch, 237, were that such matters were not reviewable.

I may have omitted considerations that influenced the court in its decision and will ask Mr. Justice Wilder and Judge DeBolt to mention any that occur to them, whether in accord with what I have said or not.

WILDER, J. My view has been stated by the chief justice, and while agreeing with him that no abuse of discretion has been shown, I go a little further and think that the trial judge decided the motion correctly, the same as I would have done if the motion had been presented before me in the first instance. Consequently I feel quite clear that the exceptions should be overruled.

JUDGE DEBOLT. I concur in what the chief justice has said that there is no showing of any abuse of discretion.

HARTWELL, C. J. The exceptions are overruled.

R. P. Quarles for plaintiff.

W. A. Kinney and *R. B. Anderson* for defendant.

Lowrie v. Baldwin, 19 Haw. 258.

WILLIAM J. LOWRIE *v.* HENRY P. BALDWIN, JAMES B. CASTLE, WILLIAM R. CASTLE, GEORGE P. CASTLE, S. N. CASTLE ESTATE LTD., AN HAWAIIAN CORPORATION, JOSEPH P. COOKE AND WALLACE M. ALEXANDER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 7, 1908.

DECIDED DECEMBER 11, 1908.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF BALLOU, J.

Costs—attorneys' fees in assumpsit.

Defendants' attorneys' fees under Sec. 1892 R. L. are not taxable in an action of assumpsit dismissed for failure to comply with an order to give security for costs.

Costs—several defendants.

In an action of assumpsit against several defendants separate cost bills are not allowed under the circumstances of this case.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff claimed of the defendants \$400,000 damages for breach of contract. It was conceded that two of the counts were assumpsit, the circuit court holding that the third count which the defendants claimed to be tort alleged a cause which arose out of the contract set forth in the other counts. The original complaint included Helen K. Mead, Mary T. Hitchcock, Harriet C. Coleman and Caroline C. Westervelt who were not defendants in the amended complaint. The others, except Alexander who was not served and did not appear, filed separate demurrers to the complaint and to the amended complaint which were identical, except J. B. Castle's which, as stated in the bill of exceptions, differed in several important particulars. While the demurrers were pending the plaintiff on defendant's motion and by his consent was ordered to file a bond for costs in the sum of \$15,000 within sixty days and for his failure to

Lowrie v. Baldwin, 19 Haw. 258.

do this the case was dismissed on defendant's motion with costs to be paid by the plaintiff. Thereafter separate bills of costs, filed by all the original defendants but Alexander, were dismissed without prejudice to the right to file one joint bill, to which order they excepted and then filed a joint cost bill for \$84.20 which was allowed and judgment entered dismissing the case for failure to file the bond, costs to be paid by the plaintiff taxed as in the joint cost bill. The defendants excepted to that part of the judgment taxing the costs. The cost bills, except Baldwin's and Cooke's, included \$9,988.17 as attorneys' fees upon the amount sued for. The cost bills of Baldwin and Cooke included \$1664.70 for attorneys' fees being one-sixth of the sum claimed by each of the others. The entire amount thus claimed was \$83,234.76.

The plaintiff's contention is (1) that the defendants waived all claim to separate costs as well as attorneys' fees in assumpsit by presenting their joint cost bill of \$84.20; (2) that they were not entitled to separate bills of costs and did not become so by separate pleadings by different counsel, and (3) that the statute does not authorize attorneys' fees on a judgment of dismissal such as was made in this case.

The defendants claim that they are entitled to several costs as they had the right to sever and did sever in their defenses, and that the statute requires attorneys' fees in all actions of assumpsit to be paid by the losing party upon the amount sued for if the defendant obtain judgment, also that the plaintiff is not entitled to insist on the waiver which should have been made the basis of a motion to dismiss the bill of exceptions, if the point was well taken, which is denied.

The following is the statute under which these attorneys' fees are claimed:

"In all the courts of this Territory, in all actions of assumpsit there shall be taxed as attorneys' fees, in addition to the attorneys' fees otherwise taxable by law to be paid by the losing

Lowrie v. Baldwin, 19 Haw. 258.

party and to be included in the sum for which execution may issue, ten per cent. on all sums to one hundred dollars, and two and one-half per cent. in addition on all sums over one hundred dollars. The above fee shall be assessed on the amount of the judgment obtained by the plaintiff and upon the amount sued for, if the defendant obtain judgment." Sec. 1892 R. L.

A plaintiff can discontinue at law at any time before verdict and is then liable for costs of court. If he fail to comply with a valid order to give security for costs his action can be dismissed as in case of his failure to appear for trial.

The cases in which a judgment may be given, although no issue has arisen, are those which come to premature termination by the fault of one of the parties in failing to pursue his litigation; and this may happen either with the intention of abandoning the claim or defense or from failing to follow them up within the periods which the practice of the court in each particular case prescribes. In such cases the judgment against the plaintiff is of *nolle prosequi*, *retraxit*, or, when a plea in abatement is sustained and if requested by the plaintiff, *cassetur billa*. Judgments for the plaintiff by default or on confession of the defendant are generally that the plaintiff do recover and are either interlocutory, if damages have to be assessed, or else are final, a judgment on a verdict for the defendant being that the plaintiff take nothing. When a case is decided for the plaintiff on an issue of law arising on a dilatory plea the judgment is that the defendant answer over. This judgment, however, "is of an anomalous kind. Upon all other issues of law and generally upon all issues in fact the judgment is that the plaintiff do recover;" if his action is for damages only and if the issue be an issue in law or an issue in fact not tried by jury then the judgment for the plaintiff is only that he ought to recover his damages which would have to be ascertained by a jury, the judgment then being interlocutory, but if the issue be in fact and is tried by a jury then the jury at the same time that they

Lowrie v. Baldwin, 19 Haw. 258.

try it assess the damages and no writ of inquiry is necessary. The judgment then is final in the first instance that the plaintiff do recover the damages assessed. Stephens' Pleading, 106, et seq.

In actions of assumpsit a percentage of the amount of the judgment obtained by the plaintiff for which execution may issue is taxable for his attorneys' fees and the same percentage of the amount sued for is taxable for defendant's fees if the defendant obtain judgment. Does the judgment referred to apply in cases of the plaintiff's action being dismissed? In other words, is the judgment final in the sense of precluding the plaintiff from suing again for the same cause or may it be interlocutory although it does not finally preclude another action?

The statute requires attorneys' fees to be paid by the loser in actions of assumpsit "to be included in the sum for which execution may issue," and to be "assessed on the amount of the judgment obtained by the plaintiff" and "upon the amount sued for if the defendant obtain judgment." If this means a judgment of the same kind in the plaintiff's case as in the defendant's case it would be a final judgment and not a judgment on a dilatory plea or upon overruling a demurrer, when, according to the practice, the defendant is allowed to answer over. Although the plaintiff is a losing party on the issue made by the plea or demurrer he is not the loser intended by the statute provided the judgment obtained by the defendant is to be of the same kind as that obtained by the plaintiff.

We think that the judgments intended by the statute are of the same kind whether for one party or the other.

The defendants are not entitled to several costs which the statute does not appear to contemplate either for joint plaintiffs or joint defendants. It is also not apparent that there were separate defenses. Moreover, the defendants asked for a joint cost bill and had it taxed and included in the judgment. They cannot now be heard to complain of this taxation. How it would

Lowrie v. Baldwin, 19 Haw. 258.

otherwise be in cases of separate defenses it is unnecessary to say.

Exceptions overruled.

A. G. M. Robertson for plaintiff.

R. B. Anderson (*Kinney, Marx, Prosser & Anderson* on brief); *D. L. Withington* (*Castle & Withington* and *A. L. Castle* on brief) for defendants.

FIRST AMERICAN SAVINGS & TRUST COMPANY OF
HAWAII, LTD., *v.* A. J. CAMPBELL, TREASURER
OF THE TERRITORY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED DECEMBER 7, 1908.

DECIDED DECEMBER 18, 1908.

HARTWELL, C.J., WILDER, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF BALLOU, J.

BANKS AND BANKING—*license fee.*

Act 25, S. L. 1907, requiring a different fee for a banking license in Honolulu, Hilo and elsewhere in the Territory, is valid.

OPINION OF THE COURT BY WILDER, J.

This is an action to recover \$765, the fee with stamps for a banking license in Honolulu, paid by plaintiff to defendant under protest pursuant to Act 25 of the Laws of 1907. The circuit judge, jury waived, found for the defendant. Plaintiff then brought the case to this court on exceptions.

Act 25 of the Laws of 1907, amending R. L. Sec. 1352, relating to fees for banking licenses, reads as follows:

“The annual fee for a banking license for a business in Honolulu shall be seven hundred and fifty dollars; in Hilo, five hun-

Trust Company v. Treasurer, 19 Haw. 262.

dred dollars, and in all other places, two hundred and fifty dollars."

Plaintiff claims that this statute is invalid because contrary to either or both the 5th and 14th amendments of the constitution, its brief being confined to the contention that it discriminates arbitrarily.

The legislature in a matter of this kind may classify or discriminate if the classification or discrimination is based on some reasonable ground, which is furnished by population in some cases. *Territory v. Pottie*, 19 Haw. 99, 104.

The question remains to be considered then whether the legislature may require different license fees from banks operating in Honolulu, Hilo and elsewhere in the Territory. The evidence shows that the population of Honolulu is almost 40,000, of Hilo almost 20,000, and of all other places in the Territory less than that of Hilo.

It was said in *Robertson v. Pratt*, 13 Haw. 590, 600, "Where natural distinctions require discrimination, not to discriminate works injustice." That proposition cannot be disputed.

In the case at bar there is a natural distinction between the different places in this Territory where banking may be carried on. This, of course, allows the legislature to reasonably and fairly classify the amount of the license fee required for banking. Even if the judgment exercised by the legislature in a matter of this kind is in our opinion unwise or perhaps oppressive, still that is not of itself sufficient to declare that a statute passed pursuant to such judgment violates the equal protection provisions of the constitution. *Heath & Milligan Co. v. Worst*, 207 U. S. 338. In order to hold that this statute is unconstitutional on the grounds claimed it must be clearly and actually arbitrary and unreasonable and not merely possibly so. *Bachtel v. Wilson*, 204 U. S. 36. The statute in question, however, does not appear in any way to be oppressive, arbitrary, unequal or ill advised. Our conclusion is that the statute is valid. The fol-

Trust Company v. Treasurer, 19 Haw. 262.

lowing cases are in point: *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Hayes v. Missouri*, 120 U. S. 68, and *Missouri v. Lewis*, 101 U. S. 22.

If, as contended by plaintiff, the statute were invalid, the question would remain whether plaintiff could recover in this action, for the reason that it would have to pay the same amount of license fee under the old law, which would then still be in force, as it is required to do under the new law. In view of the conclusion we have reached, however, we express no opinion on the point.

Exceptions overruled.

Thompson & Clemons for plaintiff.

E. W. Sutton, Deputy Attorney General, for defendant.

CHARLES BLAKE v. GEORGE E. H. BAKER.

ORIGINAL.

TRIED DECEMBER 12, 14, 22, 23, 24, 1908.

DECIDED DECEMBER 24, 1908.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF BALLOU, J.

ELECTIONS—*pleading—petition.*

A petition in an election contest alleging that a certain number of ballots cast for the petitioner were not counted for him by the inspectors, and failing to allege that all the ballots were in the same condition as when cast, is sufficient on demurrer.

ELECTIONS—*validity of ballots.*

Rulings as to the validity of ballots, as held in *Brown v. Iaukea*, 18 Haw. 131 *Cornwell v. Kaiue*, 18 Haw. 167, and *Holstein v. Young*, 10 Haw. 216, are followed. The following ballots are held

Blake v. Baker, 19 Haw. 264.

valid: Where the intersection of the cross was exactly upon the line between the marking spaces for two candidates, and where the arms of one of the crosses were unusually heavy.

OPINION OF THE COURT BY WILDER, J.

This is an election contest instituted under chapter 11 of Act 39 of the Laws of 1905, generally known as the County Act, by Charles Blake, the democratic candidate for auditor for the county of Kauai, against George E. H. Baker, the successful republican candidate. According to the official returns Baker received 429 votes and Blake 425 votes. The petition sets forth besides general averments that in the seventh precinct, where the official returns showed 104 votes for the defendant and 68 for the petitioner, five ballots for the petitioner were not counted for him by the inspectors, which if counted would have given him one vote more than the defendant received. The defendant demurred to the petition on the ground that this action of the board of inspectors in failing to count five votes for the petitioner was not a cause within the meaning of the statute why the decision of the board of inspectors should be corrected, amended or changed, and that consequently there was no sufficient averment to justify an examination of the ballots in order to ascertain whether a mistake was made in counting the ballots. He claims that this would enable any defeated candidate to get a recount upon a petition setting forth that he is informed and believes that the inspectors have not counted right. The petitioner on the other hand says that he can aver no more than he has done since he does not know the cause or the motives which led the inspectors to count his ballots wrongfully.

The result is the same of a mistake of any board of inspectors in counting the ballots for the respective parties incorrectly and of an incorrect return wilfully made. In either case a contest may be made within the meaning of the statute. This was the

Blake v. Baker, 19 Haw. 264.

ruling under statutes somewhat similar to our own in *Hadley v. Gutridge*, 58 Ind. 314; *Talkington v. Turner*, 71 Ill. 234; *Stegeman v. Cook*, 102 S. W. (Ky.) 872. Moreover, the ruling in *Fernandez v. Adams*, July, 1906, a case not reported, holding that a petition in an election contest case was sufficient in this respect, controls in this case. The defendant also contended that the petition was defective in not setting forth that the ballots cast for auditor were in the same condition as when deposited in the ballot boxes.

The demurrer was overruled, Judge De Bolt dissenting, and then, following the practice established in *Brown v. Iaukea*, 18 Haw. 131, and in *Cornwell v. Kaiue*, 18 Haw. 167, the court required the petitioner to take the stand at the outset in order to show that he had definite knowledge or information in regard to the error alleged sufficient to show that this was not merely a fishing expedition or a proceeding for a recount as distinguished from a contest under the statute. This he succeeded in doing. The defendant in his answer neither admitted nor denied the allegations in regard to the alleged error in counting in the seventh precinct and alleged upon information and belief that in the eighth precinct the inspectors failed to count seven votes for him, claiming that in any event he was legally elected.

The court then examined the ballots in the seventh precinct, and found, as petitioner alleged, that the inspectors failed to count five ballots for him, the official tally list returned by the inspectors not being added up correctly. The defendant having satisfied the court as to his definite information in regard to the eighth precinct, the court proceeded to examine the ballots in that precinct, which examination failed to sustain defendant's claim. The defendant then requested leave to amend his answer so as to require the court to pass upon the validity of all the ballots in those two precincts. This leave was refused, but the court of its own motion, deeming it wise in furtherance of justice and because of the interest the public, as distinguish-

Blake v. Baker, 19 Haw. 264.

ed from the candidates, have in election contests, determined to examine and pass upon the validity of all the ballots cast for auditor in that county. The result was that the court found that 425 votes were cast for each candidate, which of course necessitates a new election.

In the main the rulings of a majority of the court upon the validity of ballots followed those announced in *Brown v. Iaukea*, 18 Haw. 131; *Cornwell v. Kaiue*, 18 Haw. 167, and *Holstein v. Young*, 10 Haw. 216. In accordance with the rulings in those cases the following classes of ballots were held valid: where the crosses were imperfectly formed or the lines of the cross duplicated; where there was a small hole at the lower end of one of the lines of the cross, evidently the result of an accident; where short pencil marks appeared opposite one arm of a cross; where there was a small puncture at the end of one of the crosses and as to one ballot on one side of a cross; where an erasure of a cross, although still discernible on close examination, had been made; where there were dotted pencil marks at the end of each line of a cross; where a ballot was torn at the top; and the following were held to be invalid: where a cross in an improper place was partly erased but still remained perfectly clear; where a name of some one other than that of a candidate appeared in pencil on the top of a ballot; where crosses appeared outside of the space provided for that purpose. One ballot where the intersection of the cross was exactly upon the line between the marking spaces provided for two candidates for sheriff was held by a majority of the court to be valid for all purposes and that it should have been counted for the upper candidate. One ballot on which the arms of one cross were unusually heavy was held to be valid by a majority of the court.

The court of its own motion after examining all the ballots objected to by either side and ruling upon their validity again examined them all before finally disposing of the case.

Blake v. Baker, 19 Haw. 264.

The court found after examining all the ballots, that each candidate received 425 votes, necessitating a new election, and rendered judgment accordingly with costs to be divided equally.

E. M. Watson and *W. W. Thayer* for petitioner.

G. A. Davis and *E. C. Peters* for defendant.

MAY K. BROWN *v.* HENRY HOLMES, TRUSTEE, GEORGE H. HOLT, AND VALENTINE S. HOLT, WATTIE E. HOLT, AMELIA A. HOLT, JAMES R. HOLT, HELENE A. HOLT, IRENE N. HOLT, MINORS, AND HELEN A. CUSHINGHAM, GUARDIAN OF SAID MINORS, THERESA M. LOUISSON, MARTHA BERGER, MAKAHA COFFEE COMPANY, LIMITED, AND FREDERICK E. STEERE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 24, 1908.

DECIDED JANUARY 2, 1909.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF BALLOU, J.

PARTITION—*cotenant's right to,—allowance for improvements—finding that partition in kind is not possible.*

A cotenant is entitled to a partition of his share in the common estate, or a sale if partition would greatly prejudice the parties. The fact that there are minor cotenants unable to purchase does not affect such right.

A cotenant cannot be allowed in case of sale for money expended for improving a small portion but not materially enhancing the value of the entire estate.

A finding that under the circumstances of this case a partition in kind is not possible is not reversed for error.

OPINION OF THE COURT BY HARTWELL, C. J. .

This was a petition filed September 7, 1907, praying for partition of a certain leasehold if capable of being partitioned with-

Brown v. Holmes, 19 Haw. 268.

out great prejudice to the parties interested, otherwise that it be sold and the proceeds divided according to their respective interests. There was no dispute about the titles alleged, namely, that the plaintiff is entitled to 4-9 of the leasehold of certain lands at Makaha, Waianae, in the County of Oahu, under a lease of November 22, 1862, to John D. Holt for the term of his natural life, 2-9 of her shares being subject to a mortgage to the defendants Theresa M. Louisson and Martha Berger, the Makaha Sugar Co. and Steere being sublessees of certain portions of the land, the other defendants being entitled as follows: Holmes, Trustee, 3-9, George H. Holt 1-9 and the remaining six defendants, who are minors, being entitled to 1-54 each. The appellant's answer alleges that the lease covers the ahupuaa of Makaha, a large tract of land of irregular shape "consisting of a valley extending from the sea to the higher points of the Waianae mountains, Oahu, and including several branching valleys and ridges, cliffs, ravines and watercourses; That a portion of said tract is level and capable of cultivation, and that other portions are covered with dense growths of forest and with lantana and other underbrush and is wholly unfit for cultivation; That by reason of the character of said lands it will be impossible for this court to make an equitable partition of said leasehold among the various persons who own interests therein;" that the leasehold "has no salable or market value for the reason that the term thereof is for the life of one John D. Holt, who is now, as respondent is informed and believes and on information and belief alleges, of about the age of eighty (80) years; and this respondent alleges that the sale of said leasehold under these proceedings would greatly prejudice the interests of this respondent and of all others having an interest therein, and would be inequitable and unjust and would serve no good or useful purpose," and that a partition or sale during the minority of the minor defendants would seriously and irretrievably prejudice their interests as they have not funds

Brown v. Holmes, 19 Haw. 268.

to purchase if a sale be ordered and that a sale would deprive them of a valuable interest as tenants in common.

No opposition was made except by the appellant. The judge appointed a commissioner to examine the land "with reference to the feasibility of making an equitable partition" who reported that the land of Makaha comprised a valley on the western flank of Mt. Kaala running with narrowing width from the sea to the summit of the main Waianae range containing some thirty-six acres and adjoining Makaha proper; that the area given in the original survey was 4969 acres. "The seacoast is mostly of a sandy character broken by a sharp and rocky promontory called Mauna Lahilahi and ending in a long and sweeping point of rocks. There are two landing places. Adjacent and approximately parallel to the shore runs the Oahu Railway & Land Co.'s railroad track, and parallel to this but somewhat farther inland is the public road, from which branch roads run to the railroad station and landings and inland to the head of the valley. The bounding ridges on the north and south, except near the head of the valley, are very rocky and quite precipitous with a wide sloping talus on either side. At the mouth of the valley and extending somewhat more than half way up toward the head is a large area of flat tillable land covered in most places by brush and algaroba trees and flanked by the rocky slopes just mentioned. The tillable land practically ends at the old homestead. Above this there is some coffee and taro land near the stream flanked by grazing land on the rocky slopes on either side. On the south side toward the head of the valley the land is of a mountainous character with a scant forest growth, which is in great part included in the leases to the Makaha Coffee Company and F. E. Steere. In the upper part of the valley there is a stream of varying volume, which is diverted above the homestead and led by various little ditches down on to the arable land. Situated on the leeward side of the Waianae Range the rainfall is very light and the lower portion of

Brown v. Holmes, 19 Haw. 268.

the valley is quite arid. Attempts to obtain water by sinking wells have not been successful, and the only source of water at present for irrigation is the valley stream. There is a fishery belonging to the land extending something over a mile from the shore but it is of somewhat doubtful value."

"The sandy strip between the shore and the railway line could be readily subdivided into lots proportionate to the numbers 1, 1, 3 and 4, which I understand represent the relative interests involved; these lots being so arranged that each lot would have access to and frontage on one of the landings, the area occupied by the rocky knob called Mauna Lahilahi being considered as valueless.

"Adjoining the railroad and extending to the first rise of ground is a large area, perhaps as much as 400 acres, of fine level land of very uniform character. This could also be readily subdivided into lots with areas proportionate to the interests involved.

"Above this is another tract of good arable land of varying quality and of irregular outline bordered and somewhat broken up by rocky strips. This, I believe, could also be subdivided in kind, but the number and size of the lots could only be determined after a careful survey. The principal difficulty in subdividing this would be in determining the exact limits between the rocky and the tillable portions, and in segregating the various classes of soil. To divide this tract in kind may necessitate its subdivision into ruinously small parcels. Because of the brush covering it, this can only be settled by a survey and plot of the land.

"There is no serious difficulty, aside from the multiplicity of lots, in subdividing the grazing land on the rocky slopes. The precipitous land on each side of the valley could be treated as practically valueless, and the bounding lines of these lots run to the summits of the two bounding ridges without prejudice to the parties at interest. This grazing land would have to be subdivided in three blocks,—one on the south side of the valley and two on the north.

"On the south side of the valley between the leases to F. E. Steere and the Makaha Coffee Company there is a piece of semi-wooded mountain land, which can be subdivided into lots of

Brown v. Holmes, 19 Haw. 268.

proportionate area, running from near the stream to the summit of the bounding ridge on this side.

"There is still left to be considered some 17 acres of coffee land lying along the south side of the stream and various parcels of taro land. Leaving out of consideration the question of situation with respect to the water supply, which is practically the same for all these parcels, they can be subdivided without much difficulty. The subdivisions would necessarily be small, but with taro land that is not much of a drawback.

"I think that I have indicated with sufficient detail how the land by itself might be partitioned in kind without prejudice to the parties at interest. The expense involved in surveying and subdividing and in fencing the various lots of grazing land would be considerable and I doubt if it would be warranted considering the indefinite term of the leasehold.

"APPURTENANCES TO THE LAND. I have hitherto considered only the land by itself but there are various appurtenances of the land that must be taken into consideration in any attempt to make an equitable partition. Starting from the seashore, we may list these as follows:

"I. THE FISHERY. This could be easily partitioned in kind.

"II. TIMBER AND OTHER GROWTH ON THE LAND. The arable land is covered by a growth of young algaroba trees. This is distributed with fair uniformity and is not of sufficient size to make any great difference in such a subdivision as I have outlined. There are, however, various fruit and other trees within the homestead inclosure that cannot be equitably partitioned with the land except by making the parcels too small to be of value.

"III. IMPROVEMENTS STANDING ON THE LAND. These comprise various fences and walls, some large buildings now occupied by Chinese tenants, a large dwelling house at the homestead, a stonelined reservoir for water and various ditches for conducting it on to the land, about 17 acres of growing coffee trees, and other improvements of less value. Except the coffee trees, these improvements obviously cannot be partitioned in kind with the land.

"IV. THE WATER SUPPLY. This and the improvements just mentioned constitute the greatest difficulties in the way of

Brown v. Holmes, 19 Haw. 268.

an equitable subdivision of the property. In the head of the valley is a comparatively good stream of water, which is augmented by springs as it flows down. In places part of the water disappears under ground to reappear again farther along. Finally, near the homestead what water is not drawn off disappears altogether. The elevation of the stream is such that the water can be easily conveyed to any part of the tillable land. At the time of my visit there was sufficient water flowing in the stream to irrigate as much as 200 acres of cane land. In dry seasons I am told that the stream at times runs dry. As I have already stated, this stream is the only available source of water for irrigation, without which the lands in the lower part of the valley could not be cultivated and would not be of any value at all for farming and of no great value for cattle raising.

"There are only two feasible methods of partitioning the water: (1) by means of a partition weir, (2) by a time distribution. The first would involve the construction and maintenance of a separate and elaborate system of ditches leading to the lands of each party in interest, which, considering their uncertain tenure, is alone sufficient to condemn it as impracticable. To partition the water by allowing each party to use it for a length of time proportional to his interest with some central authority to supervise and regulate such use and to keep the water ways in repair is entirely practicable; but unless some convenient system of regulation and control can be agreed upon by the parties at interest, the water supply like the improvements on the land is incapable of partition in kind.

"FUTURE DEVELOPMENT OF RESOURCES. So far I have avoided the discussion of the latent resources of the land. One riding over it is struck by its undeveloped possibilities, such as the increase and conservation of the water supply, the raising of dry land crops like sisal and cocoanuts on the lower flats, the utilization of the elevation of the stream for the development of power, and the possible quarrying of sandstone and other stone for building purposes. A partition of the land would undoubtedly be prejudicial to the best and greatest development of these latent resources, and by no scheme of partition would it be possible to make an equitable distribution of them.

"SUMMARY. Physical features alone considered, I believe that an equitable partition of the property included in the lease-

Brown v. Holmes, 19 Haw. 268.

hold could be made on the basis of its present condition without prejudice to the parties at interest; provided that the improvements on the land were excepted from such partition by mutual agreement and some central authority were constituted for the control and distribution of the water supply. Unless the improvements on the land are excepted and some satisfactory arrangement is made for the mutual control of the water supply, an equitable partition of the property is not feasible.

"The question as to whether any subdivision requiring considerable expenditure for surveying and fencing is justifiable under the uncertain tenure of the parties at interest, I leave for Your Honor to decide."

Other evidence relating to the land was adduced at the hearing showing the uses which had been made of it and those of which it was susceptible, also that two irrigation ditches had been made by the appellant at an outlay of \$200, and that he had cleared and plowed and in part planted about 100 acres.

The judge said that from the commissioner's report he was of opinion "that partition of the land in kind is not possible," adding: "From the evidence it appears that several of the tenants in common have used small portions of the land for cultivation, have pastured stock on the land and sold firewood therefrom. George H. Holt, one of the tenants in common, has dug a ditch at a cost of approximately \$200.00 for the purpose of conveying water for irrigation to a small area that he cultivated. He claims to have received \$1000.00 for watermelons raised on the land last year and \$400.00 from the sale of cattle raised on the land. His counsel contends that a sale of the lease would result practically in a destruction of the property partitioned. Plaintiff is entitled to partition as a matter of right, 145 U. S., 116, and the fact that the duration of the estate depends upon the life of a man 70 years of age cannot affect her right."

"It does not appear that the value of the property has been enhanced through the improvements claimed to have been put on the land by George H. Holt."

Brown v. Holmes, 19 Haw. 268.

Thereupon it was decreed that a sale by a commissioner be made and that the proceeds, after payment of costs, be divided among the parties according to their respective interests, from which decree, dated September 12, 1908, this appeal was taken by Geo. H. Holt.

The appellant submits that a sale would mean practical destruction of the leasehold interest, the principal witness for the petitioner having testified that at the best the lease, if sold, would bring \$2 000 and that it would be a gamble even then whether the purchaser would succeed in making his purchase price out of his investment; that no one would bid any reasonable amount upon a leasehold depending upon the life of a man past sixty-nine years of age, while a considerable sum per annum is now obtained from the property; that the sale was ordered upon insufficient showing that a partition could not be made, referring to the statement in the master's report: "I think I have indicated in detail how the land by itself might be partitioned in kind without prejudice to the parties at interest. The expense involved in surveying and subdividing and in fencing the various lots of grazing land would be considerable and I doubt if it would be warranted considering the indefinite term of the leasehold." It is urged that the interests of the minor defendants would be greatly prejudiced by a sale, citing *Clason v. Clason*, 6 Paige Ch. 541; *Claxton v. Claxton*, 56 Mich. 557.

The appellant also claims that the court erred in making no allowance to him for his improvements because they did not enhance the value of the entire estate and that the evidence did not tend to support this conclusion, but although the small ditch built by him would not appreciably enhance the value of the entire estate it did enhance that of the small piece planted by him so that if a partition in kind had been ordered he should have been awarded the land which he had improved and should have been allowed the value of his improvement in case of sale.

Brown v. Holmes, 19 Haw. 268.

The plaintiff contends that she is entitled as of right to a sale if a partition is not fair and practicable, and refers to J. F. Brown's testimony that Makaha "is composed of every kind of land that is found in the Hawaiian Islands, that is to say, agricultural land, taro land, grazing land, mountain land, forest land," adding, as shown by the commissioner's report, "a sea fishery, beach lots, water supply, improvements and undeveloped possibilities," and submits that where, as here, the improver was aware of his title and made improvements without consent of cotenants he is not entitled to an allowance and that where they do not enhance the value of the entire land he should not be allowed for their value.

"A writ of partition lies at common law for one or more parceners against the other or others," Freeman on Cotenancy and Partition, Sec. 420, the reason being "that as tenancy in coparcenary arose by operation of law, it was only proper that the law should afford the means of severance." 3 Pomeroy's Equity Jurisprudence, 2 ed. Sec. 1386, n. 5. "By stat. 31 Henry VIII., c. 1. tenants in common and joint-tenants of estates of inheritance held in their own rights, or in that of their wives, were compelled to make partition in 'like manner as parceners by the common law of the realm were compelled to do.'" Freeman, Sec. 421. "As early as the reign of Elizabeth, partition became a matter of equitable cognizance; and now the jurisdiction is established as of right in England and in the United States." Pomeroy, Sec. 1387. It is clear that partition either of the estate or of the proceeds of its sale is a matter of right. *Willard v. Willard*, 145 U. S. 120.

By statute a sale may be ordered and the proceeds divided if partition in kind cannot be made "without great prejudice to the parties." Sec. 1648 R. L. The finding of the judge that a partition in kind was not possible, meaning that it was impossible without great prejudice to the parties, was based upon the commissioner's report and consideration of all the facts therein presented and alluded to in other evidence.

Brown v. Holmes, 19 Haw. 268.

The varied conditions of the property, the variety of uses to which different portions can be put, the absence of profitable use to which much of it is susceptible without large expenditure of time and money, and taking water from non-agricultural to agricultural land,—all this presents a complicated problem, the solution of which, without sacrifice of, or injustice to, the interests of some one or more of the cotenants, is extremely difficult. Considerable discretion must be allowed in determining whether or not under all the circumstances partition would greatly prejudice the common interests. On the other hand, the uncertainty of the tenure and the chances of its early termination might prevent a sale for a sum of money which, when divided among the cotenants, would equal the profit which each of them can make out of the property during the balance of the term of the lease. We cannot say that upon all these facts and obvious considerations it is sufficiently clear that the judge abused the discretion which the case required him to exercise to justify us in reversing his finding on the ground that it was not sustained by evidence.

The appellant's expenditure of money in making ditches, clearing and plowing and planting might entitle him to have the improved portion set apart for or on account of his share if a partition were made, but it would be impossible on a sale of the premises as a whole to say how much higher price was obtained by reason of this expenditure.

The court can properly guard the interests of the minors by declining to confirm a sale which clearly sacrificed their interests or those of any of the other defendants, the fact that none of them had money to purchase not depriving the plaintiff of her right to a partition or a sale if a partition in kind would be extremely injurious to all concerned.

Decree affirmed.

J. W. Cathcart and *A. G. M. Robertson* for plaintiff.

W. W. Thayer for George H. Holt, appellant.

Kulike v. Fern, 19 Haw. 278.

JAMES KULIKE, LYONS K. NAONE, DAVID KALEI, CHARLES HOLOUA, THOMAS KEOLANUI, JAS. WILLIAM LLOYD, EDWARD L. KAUAL, BOB P. KAAIHUE, JOSEPH KALANA, WM. PAOAKALANI, ROBERT HOBROH, JR., CHARLES KANEKOA, GEO. KAOLOPA, C. ARTHUR MACKINTOSH, WM. KAHELUEKAHI, JOHN KAAUA, H. M. VON HOLT, A. ST. C. PIANAIA, SAMUEL MALOI, JOHN H. DE FRIES, R. W. AYLETT, C. B. MAILE, B. P. ZABLAN, GEORGE C. BECKLEY, JOHN J. COOK, CHAS. OPUNUI, WM. H. KEAWE, ROBERT H. HOBROH, WM. HENRY, GEO. E. BRUNS, DANIEL KEKAHA, WM. H. KNOX, JOHN A. HUGHES, LELAND S. CONNESS, F. W. MACFARLANE AND PAUL W. BURNS v. JOSEPH J. FERN.

ORIGINAL.

HEARD DECEMBER 11, 12, 21, 22, 28 AND 29, 1908.

DECISION FILED JANUARY 7, 1909.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF BALLOU, J.

ELECTIONS—*petition for contest—immaterial allegations.*

Averments in a petition to contest an election, that in one precinct a certain number of persons voted after five o'clock when the polls should have been closed and that in another precinct a tally clerk was unlawfully allowed to remain in the polling place and by conversing in Chinese he attempted to and did influence Chinese voters, are immaterial unless further shown that these matters invalidated or changed the result of the election.

ELECTIONS—*contest by voters.*

An election cannot be contested by thirty voters unless they all have direct knowledge or information of one or more irregularities which would invalidate or change the result of the election.

ELECTIONS—*districts.*

Under the Municipal Act of 1907 there is but one election district in which the mayor is elected.

Kulike v. Fern, 19 Haw. 278.

OPINION OF THE COURT BY HARTWELL, C. J.
(Circuit Judge De Bolt Dissenting.)

This is a petition by James Kulike and thirty-five others, filed December 2, alleging that they are "duly qualified voters of the election districts of the County of Oahu," signed and sworn to by all of them, their jurat setting forth that "the facts, statements and allegations in the petition were just and true to the best of their knowledge and belief except such matters therein set forth and alleged to be upon information and belief, and as to these matters, things, allegations and statements they verily believe them to be true," the petitioners praying that upon legal proof being adduced on the "facts, statements and allegations in the petition the court adjudge and decree that John C. Lane was duly and legally elected Mayor," and further that the court require all the ballots cast at the election to be produced before it and that they be inspected and counted in support of the allegations in the petition and that such other order and relief be given the petitioners as is in accordance with law and that the respondent Fern be cited to appear and answer, the allegations being upon the petitioners' information and belief.

The petition itself alleges in substance, beside certain formal averments, that all the votes legally cast for Lane were not counted and that there were forty-six not counted; that in the eleventh precinct of the fifth district more than one-hundred-fifty-seven votes were counted for Fern which were not legally cast for him and that if all the votes legally cast for Lane had been counted for him and only the legal votes for Fern counted Lane would have received a majority of one-hundred-twenty-five and been duly elected; that in the third precinct of the fifth district the inspectors counted only forty-three votes for Lane and failed to count four votes legally cast for him; that in the second precinct of the fifth district the inspectors counted only eight votes for Lane and failed to count eight which were cast for

Kulike v. Fern, 19 Haw. 278.

him; that in the ninth precinct of the fifth district the inspectors failed to count five votes for Lane counting for him in all seventy votes instead of seventy-five; that in the fourteenth precinct of the fifth district the inspectors counted only seventy-seven votes for Lane instead of one-hundred-four which were cast for him, and that one Crawford, acting as clerk and keeping a tally sheet, did not keep a correct count of the votes cast for Lane, which were one-hundred-four and not seventy-seven as shown by the tally sheet kept by Crawford and returned by the inspectors; that Crawford, in violation of Sec. 87, Ch. 7, R. L., remained in the space set apart for the polling place and influenced Chinese voters favoring Achi's election—offered to bet that Achi would receive a majority of the votes from there; that in the eighth precinct of the fourth district the inspectors counted only one-hundred-ten votes for Lane instead of one-hundred-twelve which were cast for him; that in the eleventh precinct of the fifth district the inspectors allowed twenty persons to vote after five o'clock p. m. when the polls should have been closed so that the votes so cast were illegally cast, making all the votes cast in that precinct, being one-hundred-fifty-seven for Fern, seventy for Lane and one-hundred for Achi, illegally cast; that Lane received twenty-one-hundred-eighty-eight votes and not twenty-two-hundred-twelve as tabulated by the clerk of the county and that Lane was duly elected by a majority of one-hundred-twenty-five over Fern.

The defendant's demurrer to the petition, based upon four grounds, the principal one of which was that it did not appear from the petition that the petitioners in any election district or districts had joined in bringing the proceeding, was overruled. Justice Wilder thought that the election districts intended by the statute were those designated in Sec. 2 of the Municipal Act, but acquiesced in the overruling of the demurrer. The Chief Justice and Judge De Bolt thought that the district intended was the one designated in Sec. 1, including the "Island

Kulike v. Fern, 19 Haw. 278.

of Oahu and all other islands in the Territory of Hawaii not included in any other county and the waters adjacent thereto." Thereupon the defendant filed his answer including therein the averment that the petitioners were not duly qualified voters of any election district within the meaning of Sec. 57 of the act.

At the time set for hearing the petitioners appeared voluntarily at the suggestion of the court as in *Brown v. Iaukea*, 18 Haw. 131, *Cornwell v. Kaiue*, 18 Haw. 167, and *Blake v. Baker*, 19 Haw. 264, or in obedience to subpoenas taken out by their attorneys and were examined by the court as well as their attorneys in respect of their qualifications as voters, the districts in which they voted and their knowledge or information concerning the averments made in the petition. From this examination it appeared that thirty of the petitioners had not direct knowledge or information concerning any one or more irregularities which would invalidate or change the result of the election. Most of the petitioners had acquired their information from each other or from persons having no knowledge of the irregularities relied upon. The court then called for argument on the materiality of the averments in the petition relating to the presence of Crawford in one of the polling booths, his talking in Chinese to Chinese voters, and the keeping open of the polls after five o'clock, finally ruling that the averments were immaterial to the case.

After argument upon the subject the petition was dismissed on the morning of December 22 on the ground that it appeared from the testimony of the petitioners, and was admitted by them, that they had no direct knowledge or information concerning any irregularity which would defeat or change the result of the election, the court filing the following opinion, Judge De Bolt dissenting:

"HARTWELL, C. J. The opinion of the court is that the petition must be dismissed upon the ground, amongst other things referred to in the rulings upon the questions argued yesterday, that it appears from the testimony of the petitioners that there are not thirty of them having knowledge or information with

Kulike v. Fern, 19 Haw. 278.

reference to alleged irregularities in any one voting precinct. The opinion upon this matter, as well as upon the others ruled upon this morning, will be prepared and filed. I will now state a few considerations which have led the majority of the court to this conclusion.

To begin with the Australian ballot system in force here, which has been adopted in the states gradually during the last twenty years, has undoubtedly accomplished what it was intended to do in removing a great many of the opportunities previously existing for the exercise of coercion, intimidation and cheating at the polls, and it is a significant fact that in the contested election cases before the court I believe I am correct in saying there has been no instance showing actual fraud as contradistinguished from the legal fraud resulting from violations of the regulations of the voting law, the opportunities still remaining, and as long as human nature continues they will remain—as long as it continues as it is—of mistakes—honest mistakes—made on the part of the officials—of the inspectors—whether they be in counting wrongly or in improperly or erroneously rejecting or accepting ballots for the one side or the other. And it is also true that in no community is the result, especially in a close contest, going to be accepted with satisfaction by the losing party. How can they do so knowing the fallibility of human nature—the liability to mistakes of perfectly upright and honest men? Consequently you will find, I believe, in the states and the other territories generally that there are statutes, which we have not, which authorize and require a recount and a reexamination of the ballots either upon the request or petition of the defeated party or of a stated number of the electors. The tribunal which entertains those petitions verifies the official results as a matter of simple counting for one thing; they hear any objections made at the time of the reexamination of the ballots as to the validity of special ballots—individual ballots—and pass upon those objections. Exceptions may be taken by either side to the ruling of that tribunal on matters of law which are taken up like ordinary bills of exceptions in actions at law to an appellate court which passes upon them. I feel so strongly upon the natural and proper wishes of any community for such a tribunal that it is my intention to recommend an enactment

Kulike v. Fern, 19 Haw. 278.

on the subject to the legislature, but as the law now stands the legislature has seen fit to intrust to this court the serious responsibility of deciding whether a contest is presented—causes of contest—or not, and if so, the duty of reexamining the ballots. That function was formerly performed with reference to elective representatives by the legislature of Hawaii. Why the legislature transferred that duty to the supreme court I cannot say. It may be—I should like to feel that it was—because it thought that this court would be of a non-partisan nature and that it might safely enough rely upon its integrity. But however that may be, there is the responsibility and we have to meet it. We have no time to examine statutes elsewhere to see what are their requirements of petitions. Under this title “Elections,” and subtitle “Contests,” our statute gives either the losing candidate or thirty of the qualified voters in any election district the right to file a petition in the supreme court of the Territory setting forth any cause or causes why the decision of any board of inspectors should be reversed, corrected or changed.

“Now what is a contest? It is not an imaginary affair—not that certain voters think there probably were errors—and it is almost sure that there were and always will be errors. Is a contest based on mere belief or upon information more or less definite? That is to say, is it to be a guessing contest? We have all agreed that it cannot be, that there must be something definite before this court will consider that a cause making a contest is before it upon which reexamining the ballots either of one precinct or of all is justified, and it is seen that ordinarily recounting the entire vote results from examining the votes of one precinct, since a result in favor of the contestant requires the other party to insist upon our going through with the other precincts to see how they would bring him out.

“Now we have come to the conclusion—a majority of us—that the information which would justify us in regarding a contest as presented by thirty qualified voters requires that they shall know or have information, not secondhand, but direct information from those who have personal knowledge of irregularities in at least some one precinct requiring the bags containing the ballots in that precinct to be examined, otherwise any voter having information about irregularities in various precincts can state to twenty-nine others that he has heard so or can state to

Kullke v. Fern, 19 Haw. 278.

four or five voters that he has heard of irregularities in another precinct, and so on, and the thirty be made up in that way. We think that the statute does not contemplate this. There is something more than responsibility or good faith in signing the petition which is required to present a contest. I take it that any one of the voters in this county would properly have felt justified, upon hearing from any other voter of the things alleged concerning the fourteenth precinct and being advised by counsel that those irregularities would be sufficient to invalidate the entire election, in joining with the twenty-nine others in signing the petition, being, unconsciously perhaps, influenced by the feeling that a recount is almost a matter of course, to ascertain the correct result of the vote and that it ought in common fairness to be made.

"The petition will have to be dismissed.

"WILDER, J. I haven't anything to add except this, that I agree with the conclusion that the petition will have to be dismissed and will put my views in writing and file them later.

"JUDGE DE BOLT. I find that I am obliged to dissent. It seems to me that the statute clearly does not contemplate, as set forth in the reasoning announced by the chief justice, that thirty persons cognizant of the one fact are necessary to sign the petition. As I view it, a duly qualified voter might stand by and observe in vain some act by which the rights of the citizens would be grossly violated and which would clearly nullify an election but still be helpless. If the reasons given for the opinion of the court as announced are sound, no matter what rights of the citizen might be thus violated, as contemplated by the election laws, he could not act because twenty-nine others could not be had to join with him upon information and belief. Clearly, the legislature never contemplated that such a thing should exist.

"HARTWELL, C. J. I will add this suggestion, that there might be such grave violations of law, known only to one voter present, which would justify him or any other voter receiving the information from him, in bringing a writ of quo warranto. The courts are not agreed whether the statutory remedies are exclusive or not."

Upon the evening of December 24 an attorney for the petitioners orally requested the court to hear argument upon the

Kullike v. Fern, 19 Haw. 278.

question whether the statute required that in order that thirty qualified voters sustain a contest they must have knowledge or direct information of any one irregularity which, if shown by the evidence, would invalidate the election. The request was granted and counsel, although unnecessarily, filed a motion for rehearing in which they submit a point not heretofore presented, namely, that the court had no authority to examine the petitioners as to their knowledge or information of the matters charged in their petition. Strictly the motion could be struck from the files but this was not done and counsel were heard on the new matter as well on December 28. December 29 the following opinion was filed by the court:

"According to the practice in former election contests the defeated candidate could not obtain reexamination of ballots unless upon a showing, which was made in each case, that he had knowledge or direct information of some fraud, accident or mistake which would invalidate or change the result of the election. It must be a real and not an assumed or hypothetical fraud, accident or mistake to make an issue on which a controversy between candidates can arise. There is no contest or issue of fact or law presented by a statement that a decision of inspectors ought to be reversed, corrected or changed because petitioners believe, without definite information, that the decision was incorrect. The petitioners insist that it is unnecessary that the petition be verified at all and that the court, after answer filed, had no jurisdiction, before hearing evidence, to require the petitioners to prove any of their allegations. This has not been required further than to ascertain from the petitioners whether they all had knowledge or direct information concerning their charges, the object being to avoid reexamining ballots upon mere surmise of petitioners or others that there were irregularities. One of the attorneys of the petitioners is consistent in claiming that the law does not require of any petitioner any knowledge or direct information as to any irregularities charged. In this view any qualified voter, if he can get twenty-nine others to join him in a petition setting forth that any one believes that there has been error of the inspectors, can require the ballots examined and passed upon as well as counted.

Kullke v. Fern, 19 Haw. 278.

"The statute (Sec. 56) requires that 'All questions as to the validity of any ballot cast at any election held under this Act shall be decided immediately and the opinion of the majority of the Board of Inspectors of Election at each polling precinct shall be final and binding, subject to revision by the Supreme Court of the Territory as hereinafter provided;' and further (Sec. 57) that 'Any candidate directly interested' (it will be observed that a candidate indirectly interested has not this right) 'or any thirty duly qualified voters of any Election District may file a petition in the Supreme Court setting forth any cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed,' referring, of course, to decisions as to the validity of any ballots.

"The two ways of looking at the subject then are (1) that any thirty voters may dispute the decision of the inspectors in their own district, meaning, as held, the entire Island of Oahu, whether any of them know or have heard of any fatal irregularities or not; (2) that all must have such knowledge or information. In the former view it was suggested by the petitioners at their first argument that their case is like that of a creditors' bill in which one or more creditors represent all others. In the latter view all of the thirty voters and not merely one or any less number than thirty must combine to present a cause in order to make a contest. In the former case the only responsibility in bringing the petition is that thirty voters desire a reversal of the inspectors' decision which they believe to be erroneous. In the latter case, in order to obtain reconsideration of election results, emphasis is placed upon the necessity of a contest or a cause of action by each of the thirty voters in respect to some one or more decisions, which controversy could not exist unless each of them had at least heard of an alleged wrong decision.

"The petitioners' attorneys say that those whom they represent do not understand why the court allows a contest to be made and ballots reexamined on the petition of one person, he being a defeated candidate, and not on the petition of thirty voters. This is a misunderstanding of the causes, for the court places the petitioners on the same basis applying the same rule to each in requiring some fatal fact within the knowledge or

Kulike v. Fern, 19 Haw. 278.

information of the petitioner, when he is a defeated candidate, or of the thirty petitioners when they bring a petition.

"It is urged by the petitioners that the court has no authority to raise the question as to their knowledge or information, the question not being raised in the answer. The answer, however, neither admits nor denies the petitioners' averment of their knowledge or information but leaves them to its proof. In a controversy of a public nature the court would not perform its duty to the public if it did not require the status of the petitioners not only as qualified voters but as having information and belief of their charges to be shown before having the ballot bags opened.

"In the American cases cited by the petitioners it is clearly stated that the object of the notice of a contest of an election is not to perform the function of a declaration at law but to apprise the opposite party that a contest will be made on the grounds mentioned. Our statute on the contrary requires a contest to be presented by the petition. Even in statutes like that of Massachusetts permitting any ten voters to obtain a recount of ballots upon 'the filing of the proper statement in writing by ten or more qualified voters of the ward that they have reason to believe that the returns of the ward are erroneous' (Opinion of the Justices, 136 Mass. 586), a statement by ten or more voters that others than themselves, or that any less number than ten had reason to believe this, would not comply with the statute.

In *Lawrence v. Norreys*, 39 L. R. Ch. D. 213, also cited upon the claim of the petitioners that it would be unauthorized practice for a court of equity to question the truth of the averment in their petition of their information and belief instead of leaving them to put in their entire case, Stirling, J., said upon this subject: 'Now, as to that, it is undoubtedly true that as a rule a plaintiff is allowed in this Court to state his case in the first instance without in any way verifying it by oath; and the Court ought to be slow, as I conceive, when a plaintiff *bona fide* brings forward a case, in shutting him out from stating it, and from trying it in the manner provided by law.' (p. 225.) Upon appeal, however, this ruling was reversed, the appellate court saying (Cotton, L. J.): 'But the jurisdiction of the Court to prevent its process being abused, and to prevent actions being brought which are mere vexation, is original and does not depend

Kulike v. Fern, 19 Haw. 278.

on the general orders of the Court. * * * * The Plaintiff has not, in my opinion, shewn that he has any reasonable ground for making those allegations of fraud, and the conclusion which I draw is, that they were made without any reasonable ground for making them.' (p. 231.)

"The inquiry made by the court in this case was justified by precedent as well as upon principle.

"A majority of the court find no ground for reversing the former ruling which is accordingly affirmed."

After service and the filing of a demurrer by the defendant the petitioners filed fifteen affidavits from alleged voters in one precinct, setting out for whom they voted, together with a joinder in demurrer and a motion to set the demurrer for hearing. the defendant then filing a motion to strike the affidavits from the files. All of these papers the court of its own motion ordered to be withdrawn.

The court unanimously ruled that the averments were immaterial which related to the inspectors in one precinct allowing twenty persons to vote after five o'clock in the afternoon of the election day when the polls should have been closed, and in another precinct in allowing Crawford within the space set apart for the polling place and that by conversing in the Chinese language he attempted to influence and did influence by words and acts Chinese voters.

It does not appear that Crawford was within the balloting compartment referred to in Sec. 87 R. L. in which a voter is required to be alone for the purpose of marking his ballot. There is not enough alleged in regard to this matter or in the alleged attempt of Crawford to influence Chinese voters to indicate a change in the result, or in invalidation of, the election.

The allegation in regard to twenty persons voting after five o'clock was also insufficient in the absence of allegation of circumstances rendering it probable, prima facie, that sufficient of the alleged illegal votes were cast for Fern to invalidate or change the result of the election. *Lehlbach v. Haynes*, 54 N.

Kulike v. Fern, 19 Haw. 278.

J. L. 77; *Ex parte Murphy*, 7 Cow. 153. For all that appears on the face of the petition, Lane may have benefited by keeping the polls open a little after the closing time.

Petition dismissed.

G. A. Davis, A. G. M. Robertson, A. L. C. Atkinson and *A. F. Judd* for petitioners.

E. M. Watson and *W. W. Thayer* for respondent.

CONCURRING OPINION OF WILDER, J.

Section 57 of the Municipal Act provides that "Any candidate directly interested, or any thirty duly qualified voters of any election district may file a petition in the supreme court of the Territory setting forth any cause or causes why the decision of any board of inspectors should be reversed, corrected or changed." The petition in this case is brought by some thirty-six persons who are alleged to be duly qualified voters of the election districts of the city and county of Honolulu, and who voted at the election for mayor held on November 3, 1908, in that city and county. The principal objection raised by the demurrer is that the petition does not show that it is brought by thirty duly qualified voters of any election district, the defendant contending that the election districts prescribed by R. L. Sec. 105, (which are the 4th and 5th,) are the ones referred to in the Municipal Act. The petitioners claim that the Municipal Act in providing for the election of a mayor by all the qualified voters of the city and county specifies but one election district, although, as already pointed out, the petition is not drawn on that theory.

The thirty voters who desire to contest an election must all come from one election district. That is clear I think.

If R. L. Sec. 105 applies, it is by virtue of Sec. 40 of the Municipal Act which provides that "The general laws and rules governing the election of senators and representatives of the Territory shall apply in the election of city and county officers

Kulike v. Fern, 19 Haw. 278.

wherever applicable except as herein provided." It may be fairly contended, I think, that the election districts prescribed by general law would apply in the election of city and county officers were there no other provision in the Municipal Act on the subject. Section 2 of the Municipal Act, however, provides that the city and county of Honolulu "is hereby divided into six districts," naming them. In each one of these districts an election is held for city and county officers, for most of whom electors of a particular district vote in conjunction with the electors of the other districts, the sole exception being the deputy sheriffs who are elected solely by the electors of a particular district. An election district is one within the prescribed limits of which an election is held. The Municipal Act, then, having divided the city and county into districts and provided for elections in each of those districts, it follows that, when it allows thirty voters of an election district to contest an election, the election district referred to is a district which the act itself provides and in which it also provides for an election. This view is strengthened when the County Act, from which the identical language in question is taken, is considered. That act divided the County of Oahu into the same six districts as the Municipal Act, all of the supervisors, except one who was elected at large, then being elected from different districts. Under that act it could not be said that there were four election districts for all of the supervisors but one, six election districts for deputy sheriffs and but one election district for the remaining officers. The same language having been used in the later act as in the earlier one, it is nothing but natural that the same meaning was intended.

Furthermore, by section 76 of the Municipal Act, a certain number of legal voters may institute proceedings for the removal of officers, and the expression there is not voters of any one election district but voters "within the city and county," which tends to show that the geographical limits of election districts men-

Kulike v. Fern, 19 Haw. 278.

tioned in the act and of the city and county are not the same, otherwise the same words would have been used in both places. A similar distinction is contained in sections 41 and 60 of the County Act.

The contention of the petitioners, which was upheld by the majority of the court, that the district intended was the one designated by section one of the act, is also open to criticism because that section does not specify any district at all.

The argument of petitioners that if there are six election districts thirty voters of one district may contest an election in another district is not sound. What the thirty voters of one district may do is to contest an election for a particular office in that district in which they are qualified to vote, even if the electors of other districts also are entitled to vote for the same office.

The petition in this case not setting out that thirty of the petitioners are duly qualified voters of any particular election district, the demurrer should be sustained. But as it appeared from the preliminary examination of the petitioners that at least thirty of them were qualified voters of one election district, namely, Honolulu, and as, therefore, enough of the petitioners have in fact the qualifications required by statute, the petition is amendable in that regard, (15 Cyc. 412), and I consequently concur in the overruling of the demurrer. I also concur in the various other rulings set forth in the opinion of the Chief Justice.

DISSENTING OPINION OF CIRCUIT JUDGE DE BOLT.

I respectfully dissent from the opinion and judgment of the court in dismissing the petition, particularly as regards the circumstances under which it was dismissed. I concur, however, in the opinion of Mr. Chief Justice Hartwell in overruling the demurrer.

Kulike v. Fern, 19 Haw. 278.

With regard to the petition, it will be observed that the jurisdictional requirements prescribed by the statute, (Act 118, Ch. XI, Laws 1907), relative to election contests, are:

1. That the petition be filed by thirty duly qualified voters of any election district.
2. That it set forth a cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed.
3. That it be filed within thirty days after the election.
4. That it be accompanied by a deposit of \$25.00 for costs of court.

The petitioners complied with all these requirements; and the petition having been held legally sufficient on demurrer, and the respondent having thereupon filed his answer, an issue of fact was thereby presented for judicial determination.

It must be conceded, for it follows necessarily, that counsel for the petitioners were justified in assuming that this issue of fact would be examined into and disposed of in the usual manner, that is to say, in accordance with the established rules of practice and procedure prevailing in courts of justice.

But instead of being permitted to thus proceed, the petitioners at this point in the case were called, sworn and examined by the Chief Justice as to the source and nature of their information upon which their petition was based. Upon this examination being closed a majority of the court interposed a question somewhat like a special demurrer, namely, whether or not the facts disclosed by this examination were sufficient to sustain the petition. Argument was had, after which the petition was dismissed, petitioners not being allowed to offer any evidence.

To my mind such a proceeding breathes the air of anomaly. It has no place in the due and regular administration of justice. It is a stranger to the law.

Kulike v. Fern, 19 Haw. 278.

It is elementary, and an essential part of the legal education of every lawyer, that in any legal controversy in any tribunal known to the law, that when the issues of law are disposed of and an issue of fact is presented, the trial or hearing upon this issue follows as a logical sequence, and shall be disposed of according to law and the established rules of judicial procedure. The party holding the affirmative of this issue has the absolute right to conduct the presentation of his cause, either in person or by counsel, under the supervision of the court, and to adduce his evidence in proof of the controverted fact. This right is inherent and no court can rightfully take it from him.

These are plain simple rules, but they are indispensable to the due and orderly administration of justice. And, accordingly as they and the principles upon which they rest are observed, or the contrary, determines the difference between a government by law and a government by men. The former promotes the good order, happiness and prosperity of a people, while the latter tends to foster tyranny, oppression and injustice.

It is inevitable, that whenever a court departs from the well defined channels of judicial procedure, or passes beyond the realms of the law, however worthy the purpose or motive may be for so doing, it at once enters upon the boundless domain of arbitrary power. Hence, the preliminary examination of the petitioners by the court after an issue of fact was joined and the summary dismissal of the petition, without permitting the petitioners to offer any evidence in support thereof, was, in my opinion, in conflict with those vital principles just alluded to, and was wholly unwarranted.

Such procedure, if had in civil actions *inter partes*, would result in the summary dismissal of many a meritorious cause in which the plaintiff, having no personal knowledge of the facts set forth in his petition or complaint, necessarily would be obliged to rely for his proof on the testimony of others, and sometimes even on the testimony of the adverse party.

Kulike v. Fern, 19 Haw. 278.

It cannot be rightfully assumed that the petitioners expected to maintain this contest on their information and belief, but upon the sworn testimony of their witnesses able to testify of their own knowledge as to the facts and matters set forth in their petition, in the same manner in which parties in any other cause prove their contentions.

Counsel for petitioners informed the court that their witnesses were in attendance and ready to be sworn and to testify, but the court refused to hear them, or allow the petition to be amended by adding other names thereto, (9 Mont. 497) and thereupon summarily dismissed the petition. To my mind this was repugnant to the inherent principles of right and justice.

If the facts as set forth in the petition were true, then it follows that the summary dismissal of the petition, was a grievous wrong, not only to the defeated candidate, but to the entire community.

With regard to the so called precedents cited in justification of the preliminary examination of the petitioners, I submit that, for the reasons already stated, they should not be followed, even though they may be in point. It does not appear, however, that the court in any of them went as far as in this case.

Precedents, if found to be contrary to reason and justice, should not be followed. "For", as Blackstone says: "if it be found that the former decision is manifestly absurd or unjust it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined."

Moreover, the doctrine of *stare decisis*, except when the decisions have settled a rule of property or involve contractual rights, is not strictly applied.

With regard to the holding of the court that each petitioner was obliged to have knowledge or direct information of the same irregularity, mistake or fraud, as set forth in the peti-

Kulike v. Fern, 19 Haw. 278.

tion, and also that each be required to show under oath, on preliminary examination conducted by the court, not by counsel under the supervision of the court, that such knowledge and information was correct, before an examination of the ballots could be had, I find it beyond my comprehension to conceive upon what possible theory the court was able to so expand and enlarge the plain and explicit language of the statute in this regard.

As I view the matter the court required something of the petitioners which the statute clearly does not require of them. The court attempted to import into the statute provisions which it does not contain.

All that the statute requires is that the petition shall set forth a "cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed." It will thus be observed that the statute does not require that the petitioners shall have either knowledge or information of the grounds of the contest, much less to be obliged to submit themselves to a preliminary examination such as was required of them in this case.

The statute does not even require that the petition shall be verified by the oath of petitioners. And all that is required by way of showing that the contest is made *bona fide* is that the petition be filed by thirty qualified voters and at the same time deposit \$25.00 as costs of court. The legislature deemed this sufficient and the court can require no more. One qualified voter could file the petition as well as any number of voters could, but evidently the legislature, in considering the interest the public has in an election contest, concluded that more than one was necessary or proper as a guarantee of good faith. Hence, the reason for requiring that the petition be filed by thirty duly qualified voters. And this being complied with the legislature has in effect said that it was the plain duty of the court to proceed with the hearing as in any other cause. A

Kulike v. Fern, 19 Haw. 278.

petition thus filed and presented to the court gives the contestants a perfect right to offer their evidence, and it accordingly becomes the duty of the court to receive and to duly consider such evidence.

All that the court can properly require in addition to the plain terms of the statute, is that the petitioners adduce enough evidence to warrant an examination of the ballots. And the court in an election contest, as well as in any other case, can safely permit petitioners, through their counsel, to present their cause in their own way, under the supervision of the court as a matter of course.

The law recognizes the right as well as the propriety of parties being represented by counsel. Reputable counsel learned in the law and familiar with judicial procedure are indispensable in the due administration of justice. A court can better subserve public interests in an election contest by a willingness to hear what the parties have to say with regard to their claim than to turn them away unheard.

It has been held that in a statutory contest, where the contestant alleges error, mistake, fraud, misconduct, or corruption in counting the ballots or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon the request of the complaining party, because the ballots themselves, if properly preserved, are the highest and best evidence of the expression of the will of the voters. According to the weight of authority, however, a resort to the ballots themselves cannot be had until the contestant produces evidence making a *prima facie* case which indicates at least a probability that a recount would decide the election in his favor. (15 Cyc. 429). Counsel informed the court that they were ready to put on their evidence with the view of showing at least a *prima facie* case. Under all the authorities they were clearly entitled to do this. The court should have granted this request. The fact that the court had taken the testimony of the petitioners,

Kulike v. Fern, 19 Haw. 278.

if it can be called testimony, was no reason why it should refuse to hear proper testimony. The point being that the examination of petitioners by the court was wholly unauthorized by law.

In *Brown v. Iaukea*, 18 Haw. 131, it seems that the court proceeded to inspect the ballots upon nothing more than the mere allegations in the petition and without requiring any evidence at all. Subsequently the contestant took the stand and testified that he had some information of irregularities in two precincts, but as to the remaining allegations in his petition they were "a matter of guess-work." Upon this showing, however, the ballots of *all* the precincts were opened and examined.

It is proper that the court should guard against a mere fishing excursion, but this can be done with safety and propriety, by requiring, or by permitting, as was requested in this case, the contestants to adduce some evidence sufficient to show *prima facie* grounds for inspecting the ballots. And under the precedent of *Brown v. Iaukea* a slight showing only is required for this purpose.

With regard to the construction of statutes providing for the contesting of elections, the courts look upon such statutory provisions with favor. A strict compliance with the letter of the statute is unnecessary so long as the spirit of the enactment is complied with.

McCrary on Elections (431) says:

"It may be stated as a general rule, recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections."

See also 15 Cyc. 412.

In *Whitney v. Blackburn*, 17 Org. 564, the court said:

"It is the duty of courts to disregard mere technical rules or defects, and to liberally construe the law that the rights of the

Kulike v. Fern, 19 Haw. 278.

people may be preserved, and that no protection may be afforded to fraud.”

In *Curry v. Baker*, 31 Ind. 155, the court said:

“It is never the duty of courts to place so rigid a construction upon the language of any act, where there is room for interpretation, as to defeat the purposes of the legislature. Still less are we disposed to adopt such a view where the object of the law is to secure to the electors the purity of the ballot-box, by subjecting to the scrutiny of the courts the conduct of the officers in charge of the election.”

In *Minor v. Kidder*, 43 Cal. 236, the court said:

“It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. * * * * When such a statement is presented by an elector of the tribunal whose duty it is to investigate its merits, it should not be received in a spirit of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite. The investigation proposed is one in which the public at large are deeply concerned.”

In the opinion of the Justices to the Governor and Council of the Commonwealth of Massachusetts, (136 Mass. 583) respecting a statute which provided that an election might be contested by ten voters upon their written statement that they had reason to believe that the returns of the officers were erroneous, the court said:

“The provisions of the thirty-sixth section are clear and explicit, and seem to us to admit of but one construction. They authorize and require the boards of aldermen of cities to recount the ballots cast in any ward, upon the filing of the proper statement in writing, by ten or more qualified voters of the ward, that they have reason to believe that the returns of the ward officers are erroneous. * * * * The statute contemplates that

Kulike v. Fern, 19 Haw. 278.

the statement is to be made by plain people, and technical and narrow rules of construction ought not to be applied to it."

In *Richardson v. Farrar*, 15 S. E. 119, the court said:

"The statute is a broad and summary remedy for fraud in public elections, without formal pleadings, and provides a mode of contest without technicalities, and directing the county court to hear and determine the contest upon the merits and the proofs, according to the very truth and right of the matter in controversy."

In conclusion I deem it proper to observe that in this Territory the Supreme Court is given original and exclusive jurisdiction in election contests, and its decisions therein are final. Hence, the importance of a most liberal construction of the statute.

Contestants should have ample opportunity, consistent with law, to present their case and the evidence in support thereof, to the end that the will of the people in the choice of public officers may not be defeated.

H. G. MIDDLEDITCH, TRUSTEE IN BANKRUPTCY,
v. JOHN W. CATHCART AND WIFE, AND PERCY
M. POND.

MOTION TO DOCKET AND DISMISS APPEAL.

ARGUED JANUARY 4, 1909.

DECIDED JANUARY 8, 1909.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF BALLOU, J.

APPEALS—*notice within five days in cases of interlocutory orders.*

An appeal allowed from an order overruling a demurrer must be taken by filing notice of it within five days after the order.

OPINION OF THE COURT BY HARTWELL, C. J.

(Circuit Judge Robinson Dissenting.)

This is a motion by the plaintiff to docket the case and dismiss the defendants' appeal from an order of the circuit judge,

Middleditch v. Cathcart, 19 Haw. 299.

filed December 21, overruling the defendants' demurrer, from which the judge, December 28, filed an order that the defendants be "allowed an interlocutory appeal to the supreme court." December 29 the defendants filed a notice of this appeal with a bond for costs to accrue reciting that they had paid accrued costs. The ground on which the motion is based is that the notice was not filed within five days after December 21 when the order overruling the demurrer was filed. The plaintiff claims that the appeal allowed by the judge, termed in his order "an interlocutory appeal," is subject to the statutory requirement (Sec. 1859 R. L.) of notice of appeal within five days as well as paying costs accrued and depositing a bond for \$50 for payment of costs further to accrue, while the defendants insist that notice of appeal is not required by the statutory provision (Sec. 1859 R. L.) that "Appeals may be allowed upon like terms as to filing bond and payment of costs, by the circuit judge in his discretion from decrees overruling demurrers or from interlocutory judgments, orders or decrees whenever the circuit judge may think the same advisable for the more speedy termination of litigation. The refusal of the circuit judge to allow an appeal from an interlocutory judgment, order or decree shall not be reviewable by any other court."

The question presented is whether the statute relating to appeals from interlocutory decrees excludes by implication the necessity of filing notice of appeal in five days as required in other cases. The right of appeal having been held to be restricted to final decrees the statute was amended in 1898 by authorizing the judge in his discretion to allow appeals in the cases above mentioned. The statute (Sec. 1864 R. L.) allowing a party to except to rulings in matters of law in any trial before a circuit court, reducing the same to writing and presenting them to the judge within ten days was also amended by the provision that "Bills of exceptions upon like terms as to filing bond and payment of costs, may be certified to the supreme court

Middleditch v. Cathcart, 19 Haw. 299.

from decisions overruling demurrers or from other interlocutory orders, decisions or judgments, whenever the judge in his discretion may think the same advisable for a more speedy termination of the case."

The amendments should be treated alike. If the latter amendment does not dispense with the requirement that the exceptions be reduced to writing and presented to the judge for allowance and signed by him within ten days, or such further time as he may desire, then the former amendment does not dispense with the requirement that the appeal be taken by filing written notice in five days. An appeal consists in filing such notice within the time stated, and becomes effective to arrest judgment and to stay execution upon payment of costs and filing bond for future costs within ten days. It is not until allowance of a bill of exceptions and the deposit of \$25 or filing bond of that amount for costs to accrue "that the questions arising thereon shall be considered by the supreme court." (Sec. 1865 R. L.) The exercise by a judge of his discretionary power to allow an appeal from interlocutory orders is not itself an appeal. The party allowed to do so can take the appeal in no other way than by filing his notice of it within five days after the order allowing it was made. To hold otherwise would be to remove all limit of time within which appeals in such cases could be allowed. This could not have been the intention of the amendment.

The defendants should have obtained an allowance of this appeal in time for them to take it within five days from the order by filing their notice that they did so.

Appeal dismissed.

A. S. Humphreys for plaintiff.

F. W. Milverton for defendants.

DISSENTING OPINION OF CIRCUIT JUDGE ROBINSON.

I respectfully dissent. In my judgment the time within which notice of appeal may be given and within which such

Middleditch v. Cathcart, 19 Haw. 299.

appeal may be perfected by filing bond and payment of costs, in case of appeal from a decree overruling a demurrer or from an interlocutory judgment, order or decree, upon allowance of such appeal by a circuit judge, as provided by section 1859, R. L., runs from the date of the order allowing such appeal and not from the date of the judgment, order or decree from which the appeal is desired. Any other view must, necessarily, limit, as to time at least, the exercise of the discretion vested by the legislature in the circuit judge in the matter of the allowance of such an appeal, and abridge the time of the appellant within which to give notice of and perfect such appeal.

WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF HAWAII, AND GEO. C. SEA, DEPUTY HIGH SHERIFF OF THE TERRITORY OF HAWAII, v. WALTER C. SHIELDS, THEO. H. DAVIES & COMPANY, A CORPORATION, AH PING AND KIPAHULU SUGAR COMPANY, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 4, 5, 1909.

DECIDED JANUARY 11, 1909

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF BALLOU, J.

CONTRACTS—*extrinsic evidence*.

Words in an agreement having an ordinary meaning free from ambiguity and not technical cannot be explained by extrinsic evidence.

CONTRACTS—*construction*.

An agreement whereby a plantation company makes over its plantation to A to cultivate sugar cane and make sugar thereon without charge for the use of it, and declaring that its standing crops are to be the property of A, and that the company will pay

Henry v. Shields, 19 Haw. 302.

for the sugar delivered f. o. b. vessel at company's wharf, \$20 a ton for the season of 1907, \$30 per ton for the season of 1908 and \$50 per ton for the season of 1909, there being no provision in the agreement for securing delivery of the sugar to the company, makes the sugar stored in a warehouse on the plantation prior to delivery to the company subject to levy of execution on judgments by creditors of A, although under the agreement the company advanced all the funds for running the plantation.

OPINION OF THE COURT BY HARTWELL, C. J.

Writs of execution in favor of the defendants Theo. H. Davies & Co. and Walter C. Shields upon judgments for \$1236.99 and \$1966.75, obtained by them respectively against the defendant Ah Ping, having been issued to the high sheriff, and his deputy having levied upon 900 bags of sugar in the plantation warehouse at Kipahulu, Maui, and removed the sugar to Honolulu, the sugar company gave notice to the officers that the sugar was its sole property and demanded its immediate surrender and delivery to its agent H. Hackfeld & Co. Thereupon the officers applied for interpleader and upon an order to file their claims or relinquishment of them the sugar company filed its claim, the judgment creditors filed their denial of it and Ah Ping his disclaimer. The judge heard the case without a jury and decided in favor of the judgment creditors, the sugar company excepting to his ruling excluding evidence and to the judgment entered upon the decision. By agreement the sugar was sold for \$62 a ton and the proceeds held by the high sheriff on deposit with Bishop & Co. to await final determination of the claimants' right thereto or to any part thereof.

The claim filed by the Kipahulu Sugar Co. was that it is and for many years has been owner and lessee of certain lands at Kipahulu, Maui, with buildings, machinery, tools and livestock comprising the Kipahulu sugar plantation and mill and has operated the plantation and mill for cultivation of sugar cane and manufacture of the same into sugar; that in Decem-

Henry v. Shields, 19 Haw. 302.

ber 1906 a preliminary agreement was entered into with Ah Ping that he should be given the opportunity to engage in the enterprise of raising sugar cane and manufacturing it into sugar upon the company's lands, and that March 12, 1907, the agreement was reduced to writing and signed by the company, Ah Ping and H. Hackfeld & Co.; that since December 15, 1906, Ah Ping has been engaged in that enterprise using the buildings, tools, machinery and livestock before used and operated by the company as its sugar plantation and mill; that the cane from which the sugar levied upon was grown upon those lands; that the company never conveyed or transferred to Ah Ping the cane or sugar and is and was its sole owner, Ah Ping having no interest in it save only in accordance with the terms of the written contract by which he is entitled to be paid \$30 for each 2000 pounds of sugar of the crop of 1908 delivered f. o. b. at the company's wharf at Kipahulu; that he is not entitled to the \$30 a ton but is to be given credit on account of advances made to him on the contract, the final settlement to be at its termination or when the crop of 1909 shall have been fully manufactured; that the company has guaranteed payment of all advances by H. Hackfeld & Co. for cultivation and manufacture of sugar under the written agreement.

It is contended by the judgment creditors, Shields and Theo. H. Davies & Co., that since by the terms of the written agreement all growing crops upon the lands of the sugar company were to become the property of Ah Ping he became owner of the sugar made therefrom and that if the agreement required by implication its delivery by him to the company for \$30 a ton this was merely a contractual obligation not enforceable otherwise than by an action for damages, the company having relied solely upon its confidence in his observance of the possibly implied agreement to deliver the sugar to it.

The sugar company denies that the legal effect of the agreement, taken as a whole, was to give Ah Ping the ownership of

Henry v. Shields, 19 Haw. 302.

the crops or the sugar and claims that if there were ambiguity or uncertainty in its terms it ought to have been allowed to show the preliminary oral agreement and the understanding of the parties as to the written agreement. The company offered evidence, which was not admitted, that the oral agreement was that Ah Ping should be given an opportunity to cultivate sugar cane on the company's lands and make sugar from it for the sole compensation of a percentage by a tonnage rate and have no interest in the sugar or in the land and that he was not a tenant of the company in any sense.

Freeman v. Bartlett, 47 N. J. L. 33; *Gill Mfg. Co. v. Hurd*, 18 Fed. 673; *Jennings v. Whitehead & Atherton Machine Co.*, 138 Mass. 594, are cited in support of the exception to the refusal to admit this evidence.

The first case was an action on an agreement under which the defendant occupied the plaintiff's hotel, which the plaintiff contended was completely expressed in a certain writing, while the defendant insisted that part of it was verbal and that the writing did not express the whole agreement. The court held that a certain writing, not signed by the parties, which was drawn by the plaintiff and handed to the defendant who interlined and returned it to the plaintiff, was admissible in evidence as "a transaction constituting part of the negotiation out of which the contract emerged. It was part of the *res gestae*." It appeared, however, that all that the interlined paper contained "was not questioned at the trial" and was stated to the jury by the plaintiff with the paper before him as a memorandum, so that "there was no room for mistake." The court said "upon the point decided, namely, whether this writing contained the entire agreement between the parties, it is obvious that the writing itself could have thrown no additional light. The rule is well settled that when the plaintiff in error has sustained no injury he cannot rely upon a technical mistake on the part of the court as a ground for reversing the judgment." The case is not

Henry v. Shields, 19 Haw. 302.

authority for the admissibility of evidence of preliminary negotiations.

The second case was an action for damages for non-acceptance of 100 box cars made for the defendant under contract to pay for each \$580 on delivery. The defendant in his answer denied making the contract; averred that while there were negotiations looking towards a possible contract if they could agree upon its terms they did not ripen into an agreement; that in the negotiations the defendant informed the plaintiff that if a contract were made he should require a warranty of the cars; that the warranty was never given, and that shortly after the negotiations and before the plaintiff had done any work the defendant gave him notice not to build any for him. The plaintiff denied that the defendant in the negotiations required the warranty. The court instructed the jury: "In determining what the contract was the rule is to consider the negotiations passing between the parties. Their conversation in relation to it before completed, if the same is understood by the parties, shall be incorporated in the contract even though such negotiations are not repeated at the time of its completion, and such previous understanding would constitute a part of it unless changed or executed at the time it may be so completed." The case shows no contract other than resulted from the negotiations, hence it has no bearing upon the question now presented.

In *Jennings v. Whitehead & Atherton Machine Co.* the plaintiff had made a written contract with the firm of Whitehead & Atherton to give his undivided influence in favor of machinery made by the defendant who promised to pay him five per cent. on sales of machinery in Fall River. The plaintiff declared upon the contract and also upon an account annexed but relied upon an oral contract adopting the written agreement. The only change between the oral and the written contract was that the defendant corporation was substituted for the firm. The evidence of the adoption of the written contract was a conversa-

Henry v. Shields, 19 Haw. 302.

tion between the plaintiff and Whitehead, who became president of the corporation, and the subsequent acts of the corporation in dealing with the plaintiff as to sales. The court held that as the contract relied on was oral "the rule that evidence of previous or contemporaneous conversations between the parties can not be received to vary or control a written contract is not directly pertinent," and that evidence was admissible of Atherton, the treasurer of the corporation, of conversation with the plaintiff some days before the written contract was signed in which the plaintiff said that he would do certain things if they would let him sell their machinery, in consequence of which the contract was written and signed, the evidence being offered to explain what was intended by "undivided influence" in the written contract. The court held that the evidence was competent under the circumstances since it did not appear what the conversation was which the plaintiff contended was an adoption by the corporation of the written contract. "Whatever reference was made in that conversation to the written contract it could not incorporate that contract as a written contract into the oral agreement of the parties. The agreement entered into in that conversation was wholly oral and if the written contract was vague or obscure in its meaning we think it was competent to show from statements made by the parties to each other what both parties understood it to mean and also to show what it had actually been interpreted to mean by the original parties in their dealings under it for the purpose of proving what the same persons meant in making an oral contract similar or the same in terms, even if the evidence would have been incompetent had the new contract been in writing." The case merely illustrates the rule of allowing evidence of prior statements of parties and their practical construction of an agreement to explain doubtful terms.

The company further offered to explain the contract by evidence, which was refused, that "notwithstanding the recital in

Henry v. Shields, 19 Haw. 302.

the first page or two of the contract, that the real relations and standing of these parties was and the reasons for the arbitrary price was because of the fact that certain duties had been performed by the Kipahulu Sugar Company which made that price the basis of the settlement between these parties and it was only the question of tonnage and not the question of ownership of any proportion of the sugar;" that when the contract went into effect the company had expended \$96,806.75 for the crop of 1907 and \$56,904.83 for the crop of 1908; that when the sheriff made his levy Ah Ping owed \$74,425.74 on the contract; that he paid no consideration for the crops when the contract was made, the only consideration being that "he should perform certain services—expend certain amounts in the cultivation of said growing crops and to manufacture the said growing crops into sugar and deliver the sugar to the Kipahulu Sugar Company, and for his entire compensation he should receive the sum of twenty dollars or thirty dollars for the crop of 1908 less all advances made by the Kipahulu Sugar Company to him for the cultivation of said crop;" what the market price of the sugar was when levied upon; that the company and Ah Ping understood and agreed that no proprietary interest of any kind should attach to the sugar made under the agreement; that Ah Ping's only compensation under the agreement was the percentage for each ton of sugar less the company's advances; that during the entire existence of the contract the understanding and result of it has been that Ah Ping never claimed any interest in the sugar but accepted a credit "for each ton of sugar in accordance with the terms and amounts set forth in the agreement;" that advances by the company for cultivating the crop from which the sugar was made exceeded the percentage.

The company requested admission of certain facts, stated in substance as follows: That Ah Ping if present would testify that he is a resident of Kipahulu engaged in cultivating and manufacturing sugar on the lands of the company under an

Henry v. Shields, 19 Haw. 302.

agreement between himself and the company of March 11, 1907, and was so engaged during all the time set forth in the request; that in accordance with the agreement he supervised the cultivation of sugar cane on the lands of the company and the manufacture of the cane into marketable sugar, contributed nothing towards the cultivation of the cane and manufacture except his personal services, and from advances made to him; that the funds for cultivation and manufacture and payment of rents, taxes and other financial obligations set forth in the agreement to be made and performed by him have been furnished to him by the company through H. Hackfeld & Co., its agent; that the total advances for cultivating the crop of 1908 up to December 10, 1906, were \$96,806.75, and for the crop of 1910 up to December 10, 1906, \$56,904.83; that the amount advanced by the company in the cultivation of the crops was \$74,435.74 over and above all percentage due to him by reason of the cultivation of the crops and manufacture of sugar; that under the terms of the agreement he had no proprietary interest in any of the sugar and was only entitled to payment from the company as compensation for his services at a certain rate per ton for sugar delivered by him f. o. b. steamer at Kipahulu and was not entitled to any payment on account of the tonnage unless at the termination of the agreement there shall be a credit balance due him over and above advances by the company; that the sugar levied upon was part of the crop of 1908; that the crop of 1907 was 1780 tons, his percentage over and above the cost of production being \$3124.14; that the crop of 1908 was 1843 tons and owing to greater cost of production the percentage due him as his compensation has been about offset by the funds furnished by the company; that during all the time covered by the agreement he has received \$100 a month from the company for his own personal use and that in the event of failure of the enterprise of planting, cultivating and manufacture of sugar this is the only compensation that he is to receive under the agreement.

Henry v. Shields, 19 Haw. 302.

The judgment creditors admitted that Ah Ping, if present and if permitted to do so, would testify to these facts and agreed that the statements might be offered as his testimony subject to objections to relevancy and competency. When the statement was offered objection was made to the proposed evidence that Ah Ping contributed nothing to the enterprise except his personal services and to the proposed evidence of the advances made to him as irrelevant and immaterial; to evidence that he had no proprietary interest in the sugar as a conclusion of law; to evidence that he was not entitled to payment unless at the end of the agreement there should be a balance due him as irrelevant, immaterial and a conclusion of law, and to all the other proposed evidence as irrelevant and immaterial.

It is fully agreed by the parties that words in an agreement which have an ordinary meaning free from ambiguity and are not technical cannot be explained by extrinsic evidence, the only dispute between them on the subject of excluded evidence being as to the existence of such words. Whatever uncertainty there may be in the minds of the parties as to the legal effect of the language in this agreement we see in it no words of ambiguous or doubtful meaning. The proposed evidence of the witness' opinion, understanding or conclusions was of course inadmissible. The evidence was therefore correctly ruled out. It remains to consider the legal effect of the agreement as a whole.

The agreement, after reciting the ownership by the company of the plantation property, that negotiations have been pending between it and the planter, as Ah Ping is termed, by which he is to be given an opportunity to engage in the enterprise of raising sugar cane and manufacturing the same into sugar, and that an agreement has been reached as to the terms under which he should engage therein on the lands of the company, declares as follows:

"I. The 'Planter' shall have the free use of all the lands owned in fee simple by the 'Company' except as herein specifi-

Henry v. Shields, 19 Haw. 302.

cally excepted; the 'Planter' shall have the use of all lands now under lease by the 'Company' subject to the payment of all rents and other charges which may become due upon such leasehold property during the continuance of this agreement and subject to the terms and conditions of the leases under which said lands may be held, all growing crops now upon said lands to become the property of the 'Planter;' the 'Planter' shall have the free use of all buildings, machinery, flumes, tanks, tools, carts, wagons, harnesses and other appurtenances now belonging to the 'Company' free of all charge saving and excepting that said 'Planter' shall keep all said property in good repair and at his own expense and shall also construct at his own expense all improvements which he may deem necessary, and at the termination of this agreement he will deliver the same according to inventory attached hereto and made a part of this agreement together with all new improvements and additions thereto, in good condition, ordinary wear and tear alone excepted; the 'Planter' shall also have the right to use the live-stock now belonging to the 'Company', he to pay all cost and maintenance and to take proper care of all such animals and to replace all live-stock which may die by reason of any neglect on his part.

"II. All merchandise in store will be delivered to the 'Planter' by the 'Company' at cost price, further purchases to replenish stock are to be made from or through the 'Agent', for which the 'Planter' is to pay sixty days from the last of each month in which such purchases shall have been made. -

"III. The 'Company' will pay the 'Planter' for each and every ton of sugar 2000 pounds delivered F. O. B. vessel or steamer at the wharf of the 'Company' in Kipahulu as follows, to wit: \$20 per ton of crop, Season of 1907. \$30 per ton of crop, Season of 1908. \$50 per ton of crop, Season of 1909, delivered by the 'Planter' free of charge to the 'Company' in Honolulu.

"IV. The 'Planter' shall be allowed for his own personal use the sum of One Hundred (\$100.00) Dollars per month, this amount to be a part of the advance account to be made under this agreement and to be repaid by the 'Planter' in like manner as other advances."

Henry v. Shields, 19 Haw. 302.

Then follow nine articles to the effect that the planter agrees to furnish sufficient labor to cultivate successfully and manufacture not less than 1400 tons of sugar for the crop of 1908 and 1500 tons for the crop of 1909, with provisions for making as large a proportion of Grade "A" sugar of 96° polarization and as much over as possible allowing and deducting according to San Francisco and New York prices for any degree above or below; for keeping the property in repair and making necessary improvements and delivering the same with all improvements in like good order and condition as he received them, ordinary wear and tear alone excepted; for proper cultivation of the crops, payment of taxes, rents and charges; for buying of merchandise and supplies from or through the agent; employing a suitable engineer and sugar boiler to the agent's satisfaction; furnishing the agent with weekly reports of the sugar boiler of all sugars manufactured and a monthly report of expense; keeping books of account showing the cost of each crop.

The agreement goes on to state that "it is mutually agreed as follows:" then come fourteen articles referring to payment by the company to December 10 of employees who refuse to go on with the planter and for the planter paying the laborers for wages due after that date; for delivery to the company, to be charged to his account, of all cash then on hand; that the agent should be agent of the planter and that all advances be drawn on or through the agent; interest to be charged to the planter at six per cent. per annum on overdrafts and allowed on credits; the planter to be considered the contractor only and to have no power to represent the company or act as its agent; tax returns and other documents to be drawn by the company only; accounts to be kept by the agent between the company and the planter, entitled "Ah Ping, Advance Account with the Plantation Department," and his "Merchandise Account with the Merchandise Department," the first to con-

Henry v. Shields, 19 Haw. 302.

tain all payments, advances, deposits and credits relating to the conduct of the plantation, the other to charge for merchandise and supplies purchased by Ah Ping for the plantation store; that for sugar delivered to the steamer or vessel, as above set forth, credit will be given to the plantation account; sugar sold by the planter in Kipahulu to be charged to him at its sale value, he being credited with the amount per ton for crops as herein set forth and a settlement to be had at the termination of the agreement; the agent to appoint an inspector of the fields and crops and to give such directions to the planter as he deems necessary for the performance of his agreement; that the small cottage in the yard below the manager's house be kept furnished by the planter for visitors, furniture and bedding supplied by the company, the planter to be compensated for entertaining visitors on the company's business; the cottage in the small mule yard to be retained for the bookkeeper; the agent to make advances in accordance with the recommendation of the inspector based on the following rates—during 1907 for the 1908 crop \$15 for each estimated ton; during 1907 for 1909 crop \$20 for each estimated ton; for 1908 the balance on each manufactured ton of the crop of 1908; during 1908 for the 1909 crop \$15 for each estimated ton; during 1909 the balance due for each manufactured ton of the crop of 1909, the company to make good any deficit at the termination of the agreement by reason of the planter's failure to make full payment of advances; all money from sale of sugar to remain on deposit with the agent until final settlement, the planter being allowed interest at six per cent. per annum on credit balances of at least six months' standing; sugar at date of the contract in tanks or coolers to remain the property of the company but the planter to perform the necessary labor to properly manufacture it into marketable sugar, the company paying for the labor; the agreement to be in force from December 15, 1906, until the crop of 1909 shall have been fully manufac-

Henry v. Shields, 19 Haw. 302.

tured, with privilege of extension on terms to be agreed upon unless sooner terminated by mutual agreement or upon the entry of the company upon the premises, which may be done if the planter fail to observe any of his agreements or to produce properly manufactured marketable sugar as contemplated by the agreement, or if he abandon the cultivation for three months after notice from the company to conform to the agreement; if the company take possession as above conditioned an accounting between it and the planter to be had wherein the planter shall be entitled to all crops and sugar then on hand at its actual value less deductions for damages to the company for the planter's failure to carry out his agreement or for any loss or deterioration of the property surrendered; upon failure of the parties to agree upon payments to be made or duties to be performed the question in dispute to be submitted for adjustment to a board of three arbiters, one to be appointed by the company, one by the planter and one by the agent, the decision of the majority to be final and binding on all parties.

It is apparent from this agreement that in order to secure the requisite laborers to be engaged and superintended by Ah Ping, except that the company and its agent control the selection of the sugar boiler, engineer and bookkeeper, the company gave Ah Ping for the purpose of cultivating cane and making sugar the use of its plantation outfit charging nothing except rents payable on the leasehold, and giving him the standing crops, the purpose of the agreement being to secure crops of not less than 1400 tons for 1907 and 1500 tons for 1908. The difference between sugar at 1 ct. a pound taken off in 1907, 1½ ct. a pound in 1908 and 2½ cts. a pound from the crop in the season of 1908, and the usual market prices which the company obtained for its sale would be expected to recoup the company and its agent for advances, give them reasonable profit and possibly allowing a reasonable profit to Ah Ping for his services.

The agreement contains no provision for securing its per-

Henry v. Shields, 19 Haw. 302.

formance by Ah Ping by a mortgage or lien upon the crops or sugar. There is no ground for taking it to mean anything else than what it says, namely, that the standing crops should become his property and he should go on to raise sugar cane and manufacture sugar. A careful estimate must have been made by the parties of the margin between the ordinary expenses of running a 1500 ton plantation, taking the average cost of production and the profit in buying its sugar at \$20, \$30 and \$50 a ton for the seasons of 1907, 1908 and 1909. The instrument would have to be reformed in order to give the company title in the sugar. There is nothing expressed in the agreement which explains away or is irreconcilable with the provision that the standing crops should become the property of Ah Ping, and that after carrying on the plantation by means of advances to be made to him through the agent the company would pay the prices named for the sugar which he was expected to deliver to it.

Exceptions overruled.

C. H. Olson (*Holmes & Stanley* on the brief) for Walter C. Shields and Theo. H. Davies & Co.

H. E. Cooper for Kipahulu Sugar Co.

NELLIE HAO v. HUTCHINSON SUGAR PLANTATION
COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 4, 1909.

DECIDED JANUARY 12, 1909.

HARTWELL, C. J., WILDER, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF BALLOU, J.

PRINCIPAL AND AGENT.

The acts of an agent made with the knowledge and concurrence of his principal cannot thereafter be repudiated by the latter.

Hao v. Hutchinson Plantation Co., 19 Haw. 315.

TENDER—*effect of acceptance.*

The acceptance of an absolute and unconditional tender is binding.

OPINION OF THE COURT BY WILDER, J.

This is an action to recover rent under a lease from plaintiff which has been assigned to defendant. The circuit court, jury waived, found for the defendant and entered judgment accordingly. Plaintiff comes to this court on exceptions.

The rental provided in the lease is \$150 annually, beginning in 1900. Plaintiff claims \$375, being \$75 for each of the years 1904, 1905 and 1906, and \$150 for 1907. At the beginning of the trial defendant tendered into court \$75 as the rent for 1907, which plaintiff withdrew and accepted, and during the trial defendant produced receipts from the plaintiff signed by her agent purporting to be in full for each of the other years in question. It appears that during the year 1904 plaintiff appointed one Kekaula as her agent to collect her rents and give receipts therefor. This agent with the knowledge and concurrence of plaintiff, as the evidence shows and as presumably the trial court found, collected and receipted in full for the rent for those three years on the basis of one-half, another claimant to half of the land leased having appeared, to whom the other half of the rent was paid or held for. The proposition amounted to an arrangement between plaintiff through her agent and defendant whereby the rent stipulated for in the lease was reduced one-half in view of the fact that a third party made a claim to half of the land.

Under these circumstances plaintiff cannot now repudiate the acts of her agent. This of course has nothing to do with the question who really owns the land.

In regard to the \$150 claimed as rent for 1907, plaintiff is bound by her acceptance of the tender by defendant of \$75. The tender was absolute and unconditional and the acceptance

Hao v. Hutchinson Plantation Co., 19 Haw. 315.

of it binds plaintiff and her subsequent claim that it was accepted on account cannot avail.

The other exceptions are without merit.

Exceptions overruled.

W. C. Achi for plaintiff.

H. E. Cooper for defendant.

LUCIO FERREIRA v. KAMO; PAAUHAU SUGAR
PLANTATION COMPANY, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE OF HAMAKUA, HAWAII.

ARGUED JANUARY 16, 1909.

DECIDED JANUARY 25, 1909.

HARTWELL, C.J., WILDER AND BALLOU, J.J.

APPEAL AND ERROR—*amendment of record by district magistrate.*

A motion to amend the record of a district magistrate, accompanied by an offer to prove the record erroneous or incomplete in material particulars, should be heard and decided by the magistrate upon the evidence offered and any counter evidence that may be produced.

OPINION OF THE COURT BY BALLOU, J.

This is an appeal from an order of the district magistrate of Hamakua overruling a motion to amend the record made in conformity with the opinion of this court in *Ferreira v. Kamo*, 19 Haw. 187. The motion, made under special appearance, specifically asks that a certain lease and deed be added to the record in order to complete it, and that the record be reformed by eliminating therefrom the statement that the Paauhan Sugar Plantation Company, garnishee in the case, appeared by attorney R. H. Makekau. In support of the motion the plantation made a written offer to prove that said deed and lease were the same

Ferreira v. Kamo, 19 Haw. 317.

papers referred to by one of the witnesses in the action and were taken under consideration by the court, and furthermore that said R. H. Makekau did not during the trial of the action or at any other time appear as its attorney. According to the record now sent up this motion was overruled by the district magistrate without hearing any evidence or without giving the garnishee the opportunity of proving what it formally offered to prove.

The refusal of the district magistrate to hear the evidence offered was either arbitrary or based upon the theory that if the garnishee had proved all that it offered to prove the motion must still be denied. Upon either theory his ruling was erroneous. There may be considerable doubt as to the right of the garnishee to have inserted in the record a deed and lease which were merely referred to by a witness but not formally introduced in evidence, even if the court afterwards examined them, but there can be no doubt as to its right to have the record amended by striking out the allegation that Makekau appeared for the garnishee as well as for the defendant if the garnishee can prove that such was not the fact. This court is now asked to take the garnishee's version of the facts for granted in view of the offer of proof, but this we cannot do. The district magistrate should, as we endeavored to make clear in the last decision, hear the evidence offered on behalf of the garnishee and any evidence upon the same subject which may be offered by any other party and decide the motion upon the facts thus presented.

The appeal is sustained and the case remanded for further proceedings in conformity with this opinion.

S. F. Chillingworth for plaintiff.

No appearance for defendant.

H. E. Cooper for garnishee.

Cardozo v. Sociedade de San Antonio, 19 Haw. 319.

JOSEPHA A. F. CARDOZO *v.* SOCIEDADE PORTUGUEZA DE SANTO ANTONIO BENEFICENTE DE HAWAII, A CORPORATION.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 19, 1909.

DECIDED JANUARY 25, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ. -

COURTS—*power to make rules.*

Courts have inherent power to make rules for the transaction of their business, and assuming that the rules of the circuit courts of the Republic of Hawaii are no longer in force, the circuit court of the first circuit, in the absence of rules for all the circuits made under R. L. 1659, has power to make its own rules.

COSTS—*liability of attorneys.*

Under R. L. 1911 and the circuit court rule as to the liability of attorneys for costs the court has power to tax the costs of a commission as costs of court and hold the attorney of the losing party liable therefor, although such costs were advanced by the opposite party pending the termination of the case.

OPINION OF THE COURT BY BALLOU, J.

Plaintiff brought an action of assumpsit, during the course of which a commission issued at the instance of the defendant to take testimony in the Azores. Accompanying the return of the commission was the commissioner's bill for costs, made up of commissioner's fees, services of stenographer and typewriter and services of interpreter, amounting in all to \$97.50. This amount the defendant paid to the clerk of court who remitted it to the commissioner. Defendant having prevailed in the action presented a bill for costs including this item, but before ruling thereon moved that an order be made by the court declaring the amount of the commissioner's fees, and afterwards by amendment that the whole of the commissioner's bill, to be costs of court and directing the clerk to repay to the defendant the

Cardozo v. Sociedade de San Antonio, 19 Haw. 319.

amount advanced and to look to the plaintiff's attorney for payment. The trial judge thereupon reserved for the consideration of this court the following question: "Has this court the authority to tax this sum of \$97.50 or any part thereof as costs of court and to order the clerk of this court to refund said sum to defendant and to collect the same from the plaintiff's attorney under Rule 29 of this court or any other rule, statute or power?"

The rule referred to under which it is sought to hold the plaintiff's attorney liable reads, "Attorneys shall be liable for costs of court incurred by their respective clients." The same rule was in force in the circuit courts of the Republic of Hawaii. Rule 24 (c) 9 Haw. 723. It is argued on behalf of the plaintiff that the rules of the courts of the Republic were not after annexation the rules of the corresponding courts of the Territory, not being saved by any statutory enactment, that since annexation no circuit court rules have been established by a majority of the circuit judges as provided in R. L. Sec. 1659, and that the rule now in question promulgated by the three judges of the circuit court of the first circuit is invalid. The rule in question being the same in either instance, it is necessary to decide only that if the old rules did in fact lapse the circuit court of the first circuit, in the absence of the exercise of the statutory power prescribed by R. L. Sec. 1659 has inherent power to make rules for the conduct of its own business, and that this rule is neither outside the legitimate exercise of such inherent power nor an imposition of costs not expressly authorized by statute within the prohibition of the section.

The entire bill of the commissioner appears to come fairly within "the costs of * * * the rule or order and proceedings thereon" which by R. L. Sec. 1911 are made costs in the cause unless otherwise directed by the court. It has been already held that under this section costs of this nature may be made costs of court for which under the rule of court the attorney for the losing party may be held liable. *Waikulani v. Carter*, 12 Haw.

Cardozo v. Sociedade de San Antonio, 19 Haw. 319.

83. In that case, however, the clerk, apparently through inadvertence, had allowed the plaintiff's attorney to withdraw his balance of costs without paying the item in question, while in this case the money has been advanced by the defendant and therefore the court is not in need of the protection which has been stated to be the primary object of the rule. We do not consider, however, that the voluntary advancement of the amount by the defendant pending the termination of the litigation alters the respective rights and remedies of the parties. The costs of the commissioner were a debt of the court to one of its officers which the court would have been obliged to discharge in any event, and the temporary assumption of this debt by the defendant gives him a right to the same remedies which the court would have.

It is true that this rule of liability of attorneys for costs is liable to work hardship in particular instances. So far as costs of commissions are concerned, however, unjust results may be minimized by the exercise of the discretion vested in the court by Sec. 1911. *Foster v. Hayward*, 9 Haw. 563. The question reserved in this case concerns only the power of the court to make the order referred to, and this question we answer in the affirmative.

W. W. Thayer for plaintiff.

A. Perry for defendant.

THE TERRITORY OF HAWAII v. M. MURANAKA.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED JANUARY 19, 1909.

DECIDED JANUARY 25, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

POLICE REGULATION—*county ordinance*.

A county ordinance making it a misdemeanor to construct or erect any building or structure designed or intended to be used

Territory v. Muranaka, 19 Haw. 321.

for a lodging or tenement house within five hundred feet of any public school premises is not an exercise of power granted to boards of supervisors by Act 39 S. L. 1905, Sec. 62, Par. 5. "To regulate by ordinance within the limits of the county all local police, sanitary and other regulations."

OPINION OF THE COURT BY HARTWELL, C. J.

The defendant was charged before the district magistrate of Honolulu with violating upon October 5, 1908, a county ordinance of September 28, 1908, by constructing and erecting within five hundred feet of the premises of the Kaahumanu public school in Honolulu a building designed and intended to be used for a lodging and tenement house, the ordinance reading as follows:

"Section 1. No person shall construct or erect or cause to be constructed or erected in the County of Oahu any building or structure designed or intended to be used for a lodging or tenement house within five hundred feet of any public school premises.

"Section 2. Any person violating this ordinance shall, upon conviction, be fined in a sum not exceeding two hundred (\$200.00) dollars.

"Section 3. The continuance of any such violation, after conviction, shall be deemed a new offence for each day on which the same is so continued.

"Section 4. This ordinance shall take effect from and after its publication."

The defendant was found guilty and sentenced to pay a fine of \$20 and costs \$4.10, from which sentence he appealed upon points of law, claiming that the ordinance (1) is unconstitutional in depriving him of his property without due process of law, denying him equal protection of the law, in discriminating against lodging and tenement house keepers in favor of hotel keepers, and as an unreasonable and arbitrary exercise of police power, and (2) is ultra vires and void not being authorized by the County Act and conflicting with the building laws of the

Territory v. Muranaka, 19 Haw. 321.

Territory; (3) that if the ordinance is valid its application to defendant is illegal since he had been granted a permit by the superintendent of public works September 14, 1908, to construct and erect a building for the erection of which he is prosecuted, and at the date of the ordinance had proceeded with its construction and expended thereon in labor and material more than \$200.

The contention of the county attorney is that lodging houses in the vicinity of school houses may affect injuriously the morals and manners of the children and their general welfare and therefore reasonably and properly are prohibited within five hundred feet of a school house as a lawful regulation of a business in itself legal. It is enough, he says, that enforcement of the ordinance would tend to protect the morals of such children, conduce to their welfare and comfort and in some degree protect their health; that lodging houses do not belong to the same class as hotels which are not as undesirable.

To the defendant's contention in argument that the mere erection of a building intended to be used as a tenement house has no legitimate connection with its use for that purpose the county attorney submits that the object sought to be attained is preventing the maintenance of tenement houses in that vicinity and that if a structure is aimed to be so used the object sought is best secured by forbidding the erection of the building; that the laws of the Territory which provide for licensing tenement or lodging houses under certain conditions are not complete legislation upon the subject as they do not provide in what locations they may be maintained, which is a matter that can be regulated under the police power of counties; that the ordinance is not inoperative as to the defendant by reason of this structure having been commenced prior to its passage because before he could legally commence to build a permit was required to be secured for building in its present location and until then he had no vested right to build there.

Territory v. Muranaka, 19 Haw. 321.

The first question to consider is whether constructing a building within the prescribed area with intent to use it for a lodging or tenement house can lawfully be punished, for unless this can be done discussions of the other questions would be academical. It is true, as claimed by the county attorney, that it is only the maintenance of such houses that may become objectionable and is sought to be prevented, but the building may be used for other purposes entirely unobjectionable and if unoccupied it would be harmless to any one's health or morals; nor does it follow logically that it will be used for the intended purpose.

The cases cited in support of the form of the ordinance usually show a prohibition of keeping or maintaining as well as erecting, as in *St. Louis v. Fischer*, 167 Mo. 654. In *St. Louis v. Russell*, 116 Mo. 251 (the case of a livery stable), a city ordinance was sustained which made it a misdemeanor to commence any building in the city without a permit from the commissioner of public buildings. The decision was not based upon the ground that a livery stable is a nuisance per se but because it "may become so if so kept as to destroy the comfort of owners and occupants of adjacent premises and so as to impair the value of their property." The defense was made that "There is a clear distinction between the erection of the building itself and the use to which that building may be put," but the court held that the legislative power of the city to regulate livery and sale stables included the right to designate where they may be located and prohibit their erection at other places. The County Act, however, does not give such power to boards of supervisors, but merely the power (Sec. 62, Par. 5.) "To regulate by ordinance within the limits of the county all local police, sanitary and other regulations not in conflict with the general laws of the Territory or rules or regulations of the Territorial Board of Health." Therefore, unless erecting the building for the purpose intended can be prohibited upon police or sanitary grounds, the ordinance would be unauthorized.

Territory v. Muranaka, 19 Haw. 321.

In *Aldrich v. Howard*, 7 R. I. 87, the erection of a large livery stable next to the plaintiff's dwelling house, hotel and stores was enjoined on the allegations in the bill that the proposed use of the stable would cause irreparable damage to the plaintiff by rendering from its disagreeable and unwholesome effluvia, noise, flies and other nuisances his dwelling house untenable and break up the custom and diminish the rents of his hotel and stores. It is one thing, however, to enjoin a destructive nuisance before it has accomplished its harm and another to penalize an act, harmless in itself, in consequence of its harmful intention or because it is a preparation to do that which is not prohibited and is not wrongful per se.

In *Chicago v. Stratton*, 162 Ill. 494, a city ordinance provided that it should not be "lawful to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes a livery, boarding or sale stable, gas house, gas reservoir, paint, oil or varnish works within 200 feet of such residence on either side of the street unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing." It was held that the express grant of power to direct the location of livery stables made by the legislature to the municipality carried with it all necessary and proper means to make the power effectual and included the power to determine the location of a livery stable and to consult the wishes and ascertain the needs of the residents of the block where the stable is to be kept. It was conceded that the defendants were keeping a livery, boarding and sale stable without the permit, therefore the question did not arise whether merely erecting the building with intent to use it for a stable would be punishable.

If the ordinance had declared that keeping a lodging house within the designated area was an offense then the question whether building it for that purpose could be made a penal offense would be different from that presented under the ordi-

Territory v. Muranaka, 19 Haw. 321.

nance in its present form in which the use of the building is not prohibited but merely its erection. This is not an instance of an attempt to commit an offense which may be merged in the offense if committed, or of an "act done towards committing and in part execution of the intent to commit the same." (Sec. 2716 R. L.), for if there were such an offense created by the ordinance it would be "a mere preparation of the means to commit" it, "nothing being done in execution of the intent to commit the same." Sec. 2717 R. L. As using the building for the purpose named is not prohibited, erecting it, if the erection were deemed to be in part execution of the purpose, could not be punished, being in itself harmless and not subject to be prohibited under police or sanitary regulation.

Judgment reversed.

F. W. Milverton, Deputy County Attorney of Oahu (J. W. Cathcart with him on the brief), for the Territory.

E. C. Peters for defendant.

MARY E. R. CORRERA v. JOAQUIN R. CORRERA. .

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 20, 1909.

DECIDED JANUARY 25, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

DIVORCE—*alimony in case of failure to provide.*

Under the divorce statutes failure to provide is an offense amounting to adultery, and alimony may be allowed in such a case under R. L. Sec. 2237.

OPINION OF THE COURT BY WILDER, J.

This is a question reserved by a circuit judge to ascertain whether in a divorce suit on the ground of failure to provide,

Correra v. Correra, 19 Haw. 326.

which was proved, the libellee may be ordered to pay to the libellant permanent alimony or, in the words of the statute, a "suitable allowance."

The statute in question is as follows:

"Upon granting a divorce for the adultery or other offense amounting thereto, of the husband, the judge may make such further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage, and to provide such suitable allowance for the wife, for her support, as the judge shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." R. L. Sec. 2237.

The only question involved is whether a failure to provide suitable maintenance for a wife by a husband able so to do is an offense amounting to adultery within the meaning of the statute referred to.

Originally in these islands a divorce, as distinguished from a separation, could only be obtained on the ground of adultery. Laws of 1845-1846, p. 62. In such case where the husband was at fault the wife was entitled to alimony. In 1853 the statute was amended so as to allow divorces to be granted for the following additional grounds, namely, wilful and continued desertion without cause for a certain period, five years absence in a foreign country and unheard of, and the commission of a crime involving a sentence of five years or more. Laws of 1853, p. 60. It was in this amending statute that the expression "adultery or other offense amounting thereto" first crept in. Since then other grounds for divorce have been added at various times. R. L. Sec. 2228. An offense in its legal signification means the transgression of a law. *Moore v. Ill.*, 14 How. 13, 19. It has "no precise or technical signification and is used, generally and loosely, in the sense of the matter or transaction which constitutes the subject or cause of the suit." *The Idaho*, 29 Fed. 189, 192. The definition of offense contained in R. L.

Correra v. Correra, 19 Haw. 326.

Sec. 2701, relating to criminal law, does not, as contended, limit its meaning when used in the divorce statutes. It is the natural as well as the legal duty of the husband to support his wife. R. L. Sec. 2257. The legislature has provided that that duty shall not cease upon the dissolution of the marriage for the husband's misconduct, and such a provision should be construed liberally in favor of the wife in order that she should have support in the future. *Campbell v. Campbell*, 37 Wis. 206. In the Laws of 1856, p. 15, in regard to allowing divorced persons to marry again, the legislature referred to all grounds for divorce as offenses. That is what we think the statute in this case means when it says "adultery or other offense amounting thereto," that is, adultery or any other ground for divorce, all being offenses within the meaning of the divorce laws. This is in accordance with the practice under this statute ever since it was enacted in 1853. Moreover, any other construction would allow alimony in case of a failure to provide where a separation only was decreed and not in the case of an absolute divorce, which does not seem to have been intended.

In California and South Dakota, under practically identical statutes as ours, alimony is allowed where a divorce is granted for an offense of the husband, and in neither state has it ever been contended, so far as their reported decisions show, that offense meant a violation of the criminal laws.

The reserved question is answered in the affirmative.

E. C. Peters for libellant.

A. G. M. Robertson for libellee.

Savidge v. Antone, 19 Haw. 329.

WILLIAM SAVIDGE, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF MANUEL ANTONIO BARETE, DECEASED, AGNES SOARES AND MANUEL SOARES, HER HUSBAND, FRANCISCA GUERRERO AND BEN GUERRERO, HER HUSBAND, EMELIA BARETE, THEOFF BARETE, A MINOR, BY FRANCISCA GUERRERO, GUARDIAN OF HIS PERSON AND PROPERTY, LUTELLO BARETE, A MINOR, BY FRANCISCA GUERRERO, GUARDIAN OF HIS PERSON AND PROPERTY, MANOEL BARETE, A MINOR, BY MARIA BARETE, GUARDIAN OF HIS PERSON AND PROPERTY, AND JOSE BARETE, A MINOR, BY J. D. McVEIGH, GUARDIAN OF HIS PERSON AND PROPERTY, *v.* RICHARD ANTONE (OTHERWISE KNOWN AS ANTONIO RICHARD AND AS ANTONE RICHARD) AND A. J. LOPEZ.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 20, 1909.

DECIDED JANUARY 27, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EXECUTORS AND ADMINISTRATORS—*liability for disposition of personalty.*

A bill originally charging conspiracy and fraud and now sought to be maintained against an executor for wrongfully disposing of a leasehold of the estate is properly dismissed upon the finding of the trial judge, warranted by the evidence, that the executor received consideration and was acting in what he believed the best interests of the estate.

OPINION OF THE COURT BY BALLOU, J.

The plaintiffs, being the heirs and trustee under the will of Manuel A. Barete, deceased, brought a bill in equity against the two defendants, alleging that Richard Antone while executor of the will of said Barete had neglected to inventory a leasehold owned during Barete's lifetime by Barete and Antone as tenants

Savidge v. Antone, 19 Haw. 329.

in common; that Antone as executor had assigned the estate's half interest in the leasehold to the defendant Lopez, the consideration named in the instrument being "value received," and that nine months after this assignment Lopez and Antone assigned the leasehold to Henry Holmes for \$2000. The bill charges that the whole transaction was a conspiracy between Antone and Lopez, the assignment being a mere formal transaction and the purported consideration wholly fictitious, and that Antone received the entire profit of the assignment. The bill prayed that the defendants be declared trustees in respect to the estate's share of the moneys realized from said assignment and be ordered to account therefor.

Defendants answered averring the bona fides of the transaction and the case went to trial. At the close of the plaintiffs' testimony plaintiffs voluntarily discontinued as to Lopez, their counsel stating that they had failed to establish the allegation as to his connivance and collusion. The bill is now sought to be maintained against Antone upon the theory that he gave away a leasehold belonging to the estate which was actually worth \$1000.

Without considering the question whether upon this theory of the case the bill presents any grounds for equitable relief we will consider the merits of the case as shown by the evidence. The transaction on its face has a number of points which would naturally excite suspicion. The circuit judge, however, was satisfied from the evidence that the leasehold was in fact worthless; that Antone, believing it to be a positive detriment, made repeated endeavors to persuade the lessor to cancel the lease; that Lopez gave consideration for the assignment by agreeing to pay and paying the rent due from the estate which was in arrears to the amount of \$300 as well as by assuming liability for future rent. The judge further found that Lopez was unable to make the land profitable; that W. W. Ahana, the principal party in interest in the subsequent purchase, paid an in-

Savidge v. Antone, 19 Haw. 329.

flated price under the influence of a land boom and a mistake as to the extent of the boundaries, and that Ahana, after letting the land lie idle for several years, induced the lessor to cancel the lease by paying three years' rental in advance, coming out of the transaction about \$4000 loser. Since that time it appears that the land has been unused for any purpose.

Upon a review of the whole testimony we are of the opinion that the findings of the circuit judge were warranted by the weight of the evidence, and while the executor is open to criticism for not including the leasehold in his inventory, we must concur in the conclusion that in assigning the half interest in the leasehold to Lopez for the consideration agreed upon he was acting in what he believed the best interests of the estate.

The decree appealed from is affirmed.

C. F. Clemons (Thompson & Clemons on the brief) for plaintiffs.

J. A. Magoon for defendant.

IN RE ASSESSMENT OF PROPERTY TAXES MAKEE SUGAR COMPANY.

APPEAL FROM TAX APPEAL COURT, FOURTH DIVISION.

ARGUED NOVEMBER 16, 1908.

DECIDED JANUARY 28, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TAXATION—*valuation of plantation.*

The valuation of a sugar plantation made by the tax appeal court is sustained.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by the Makee Sugar Company from a decision of the tax appeal court of the fourth division fixing an

In re Taxes, Makee Sugar Co., 19 Haw. 331.

assessment of the company's property for taxation at \$900,000 as of January 1, 1908, the return being \$686,180.90 and the assessor's valuation \$1,000,000. This taxpayer conducts a sugar plantation, its property consisting of real and personal property of several classes or kinds of each which are combined and made the basis of an enterprise for profit within the meaning of R. L. Sec. 1216. It was therefore properly assessed on the enterprise for profit theory. *In re Wichman*, 16 Haw. 793.

The plantation conducted by the taxpayer is situated on Kauai, is an irrigated one, its average annual crop for the eight years preceding 1908 being 8584 tons, the yield per acre varying from 4.04 tons in 1903 to 3.24 in 1907, the average yearly net profit from 1900 to 1907 having been a little over \$117,000. The yield for 1908 was estimated to be about 7500 tons, which would return a net profit for that year of about \$170,000. The plantation is a well managed one and run economically without having any agent. The capital stock is \$500,000. No sales of shares of stock are reported. About one-half of the available cane land of this company was leased from the government, which leases expired May 1, 1907, and were continued by mutual agreement up to May 1, 1908, during which time negotiations in regard to the continuation of the use of the land on new terms were being carried on by the taxpayer and the government. On January 1, 1908, the date of the assessment, it was uncertain how these negotiations would turn out. The testimony taken before the tax appeal court in August, 1908, showed that the negotiations between the government and the taxpayer had been broken off and the land had been returned to the lessor. It was the opinion of the manager of the plantation that with the reduced amount of land the annual crop hereafter would not exceed 3500 tons, which at the most and under extremely favorable circumstances would not return a net profit of more than \$50,000, it being also his opinion, however, that there would be no profit at all. He fur-

In re Taxes, Makee Sugar Co., 19 Haw. 331.

ther testified that a plantation that did not pay ten per cent. annually for five years running was not worth buying. The fee simple lands owned by the plantation are a little more valuable for cane than the leased lands of the government. The assessment as agreed to by the company was in 1905 \$1,400,000, the reductions since then, according to the assessor, having been partly on account of these expiring leases from the government. The assessor testified that in his opinion even with the reduced area of land the plantation could be run at a profit. He also testified that he considered an assessment of \$1,000,000 to be a fair and reasonable aggregate value, stating that in making up the assessments he took into consideration the gross receipts, actual running expenses, the detailed items of property and all other facts reasonably and fairly bearing upon the valuation.

There were but two witnesses produced, Mr. Fairchild, the taxpayer's manager, and Mr. Farley, the assessor. Each was quite positive in his opinions and beliefs. As stated *In re Taxes Wailuku Sugar Co., 18 Haw. 423*, "This court has uniformly held that it does not reduce or increase the valuation made by a tax appeal court which appears to be fair and just but allows it to stand unless shown to be erroneous or based on a wrong theory or insufficient or defective data." In that case the court said that a higher valuation by the tax appeal court might properly have been sustained although it did not raise it, and in this case a lower valuation, if so found by the tax appeal court, might and probably would be sustained, yet the amount fixed should not be changed in view of the weight which should be given to the decisions of tax appeal courts.

That the plantation has lost practically one-half of its available cane land should undoubtedly, and we presume will, be taken into consideration in fixing the valuation for 1909. As already stated, these leases expired on May 1, 1907, and yet the taxpayer itself returned a valuation for that year of \$1,000,000.

In re Taxes, Makee Sugar Co., 19 Haw. 331.

On January 1, 1908, the uncertainty of securing another lease of the government lands justified a reduction from the assessment. The exact amount of that reduction, however, is difficult to ascertain, being a matter about which possible purchasers and others would differ. Therefore, as the tax appeal court has made a certain reduction on that account, under all the circumstances we do not feel justified in modifying it.

The decision of the tax appeal court is affirmed.

W. A. Kinney (*Kinney & Marx* on the brief) for the taxpayer.

W. L. Whitney, Deputy Attorney General, for the tax assessor.

IN THE MATTER OF THE PETITION OF LEWERS
& COOKE, LTD.

APPEAL FROM COURT OF LAND REGISTRATION.

ARGUED JANUARY 18, 26, 1909.

DECIDED JANUARY 28, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

APPEAL AND ERROR—*second appeal*.

The appeal of one party having been sustained and a new decree entered by the trial court, a motion to dismiss an appeal from the new decree is denied, it appearing that new points of law, although not raised by counsel, exist to the extent of requiring a modification of the decree.

APPEAL AND ERROR—*findings of fact by trial judge*.

It is within the power of trial judges to make findings of fact, and such findings will not be stricken from the record on motion.

REGISTRATION OF LAND TITLES—*practice*.

The petition for registration of a parcel of land having been denied in toto in consequence of an adverse claim to a portion of the parcel, this court, upon appeal, modifies the decree so that it shall be without prejudice to the claim to the uncontroverted portion.

In re Lewers & Cooke, Ltd., 19 Haw. 334.

OPINION OF THE COURT BY BALLOU, J.

The decree of the court of land registration registering the title of Lewers & Cooke, Ltd., having been reversed upon the appeal of Mary H. Atcherley (*In re Lewers & Cooke, Ltd.*, 18 Haw. 625; 19 Haw. 47), the court of land registration entered a decree denying the petition for registration. After entering the decree the judge of the court of land registration prepared and certified a statement of facts of the case. The appeal of the petitioner from the decree was submitted upon the briefs filed on the previous appeal, but counsel for Mrs. Atcherley interpose a motion to dismiss the appeal and a motion to strike the statement of facts from the files.

We see no ground for striking the statement of facts from the files. While it has been held that the circuit judges may refuse to make findings of fact (*Waialua Agricultural Co. v. Oahu Railway and Land Co.*, 18 Haw. 81, 87), and the same is true of the court of land registration, yet the making and filing of such statements, whether done formally at the request of either party or embodied in the opinion of the court or judge, is frequently done as a matter of practice and is of material assistance to the appellate court. In jury waived cases particularly it some times happens that the decision is so brief as to afford no clew as to the matters of law and fact passed upon, and that it is possible to support the decision upon a view of the facts which, while sustained by some of the evidence, is so completely contradicted by other testimony that it was in all probability not the real ground for the decision. The appellate court, while satisfied that in all probability the decision was based upon a true view of the facts and an erroneous application of principles of law, is obliged to sustain the decision because there is some testimony to support an improbable view of the facts. We do not wish to discourage the practice of the trial courts in indicating either in their opinions or in separate find-

In re Lewers & Cooke, Ltd., 19 Haw. 334.

ings the principal questions of law and fact passed upon. It would be better practice to have findings filed prior to or contemporaneously with the decree, but we do not consider this material if they are filed before the record is sent to the supreme court. As to the point that the filing of such a statement in connection with a second appeal tends to render uncertain grounds of the decision heretofore rendered it would be observed that on appeal the whole record is before us and the statement of facts is merely an aid and not binding if contradicted in any particular by the rest of the record. The remarks in *Hutchins v. Bierce*, U. S. Supreme Court advance sheets, December 14, 1908, were relative to a case pending on bills of exceptions, where the entire case is not before the appellate court but the appellate court is confined to questions of law presented by the bill of exceptions and the record therewith.

The motion to dismiss the appeal is based upon the ground that the present decree was entered in conformity with the previous opinion of this court with no new trial or evidence, and that the points of law raised by the appeal were all decided at the former hearing.

While it is true that no new points were suggested by counsel the court did not consider itself at liberty to overlook the fact that under the present decree the petition, although covering land not in controversy, was denied in toto, and requested further argument on that point. Irrespective of the decision on this question the existence of a new point available to the petitioner on its appeal is fatal to the motion to dismiss.

Passing to the merits of the case, it will be observed that the first decree of the court of land registration was reversed and the case remanded for further proceedings in conformity with the opinion of this court. *In re Lewers & Cooke, Ltd.*, 18 Haw. 625, 640. The recital in the present decree that this court ordered that a final decree be entered by the court of land registration denying the petition to register that portion of the lands

In re Lewers & Cooke, Ltd., 19 Haw. 334.

described in the petition by Mary H. Atcherley is erroneous. We did not prescribe the form that subsequent proceedings should take, particularly in view of the fact that Mrs. Atcherley had attached to her answer a cross petition that a registered title be granted to her as to the part she claimed. The court in the present case, however, did not stop with the construction thus put on our former decision but, without ordering a severance under R. L. Sec. 2417, denied the entire petition. In spite of the failure of counsel to press the point we do not think the decree should stand in this form. If the denial of the petition is final and binding as to the portion claimed by Mrs. Atcherley it might be held equally conclusive against the right to a registered title to the portion not in controversy. The decree should be modified by correcting the erroneous recital and by making the denial of the petition without prejudice to the right to obtain a registered title to the portion of the land not covered by Mrs. Atcherley's claim. Under the circumstances of the case this decree may be entered in this court. *Hind v. Wilder's Steamship Co.*, 13 Haw. 174.

Decree accordingly.

D. L. Withington and *R. B. Anderson* (*Castle & Withington* and *Kinney, Marx, Prosser & Anderson* on the brief) for Lewers & Cooke.

L. A. Dickey and *E. M. Watson* for Mary H. Atcherley.

KAHALAUAOLA U. WILLIAMS *v.* WILLIAM R.
CASTLE, TRUSTEE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 25, 1909.

DECIDED JANUARY 29, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

DOWER—*right of widow of beneficiary of income for life.*

Under a trust to pay income to the testator's widow and children and the survivor of them, and upon the death of any of the

Williams v. Castle, 19 Haw. 337.

children to his or her children; the estate to be divided upon the death of the survivor of the testator's widow and children, the widow of a child dying during the continuance of the trust has no present right of dower from the trust estate.

OPINION OF THE COURT BY HARTWELL, C. J.

This is an appeal from an order sustaining a demurrer to a petition for admeasurement of dower brought against the trustee under the will of Joshua R. Williams by the widow of John Williams one of the testator's sons and beneficiaries under his will. The petition alleges the death of testator's widow, and of one son besides the petitioner's husband. The husband's right under the will was that a share of the income of the estate be paid to him during his life. The will devises to the trustee all of the testator's estate upon trust, to "manage and invest the same in such manner as he may judge to be expedient," with power of sale and of reinvesting, "and to retain entire control of said estate during the term of this trust. And to pay the income of said estate to my wife Kaaikaula Williams and to my children Lydia, the wife of W. Chapman, John, Henry, Joshua, Josephine and Georgeana, in equal shares, during the terms of their natural lives, and the survivor of them. And upon the decease of any of my said children, his or her share is to be paid to his or her children, if any, by my said trustee, until the decease of the survivor of my said wife and children, when my estate shall be divided. And upon the decease of any of my said children without issue, their share of the income is to be divided by said trustee equally among the survivors and the issue of deceased children." A codicil revokes the provision for the daughter Lydia giving her \$10 "in full of any share in my estate."

The plaintiff claims that her husband's estate was equitable in its nature and that the rule of common law limiting dower to legal estates having been abrogated by statute in England

Williams v. Castle, 19 Haw. 337.

and in many of the states is inapplicable to conditions here and ought to be disregarded, citing *Rooke v. Queen's Hospital*, 12 Haw. 380, which held that estates tail are not known to the law of Hawaii, and *Mossman v. Hawaiian Government*, 10 Haw. 436, in which the court declined to adhere to the common law rule upon the subject of conveyances made by a disseizee; further relying upon *Shoemaker v. Walker*, 2 Sergeant & Rawle 554, in which the court said, "No good reason has been assigned for excluding the wife of her dower in a trust estate," and that in Pennsylvania by usage dower and curtesy in equitable estate are placed on an equal footing. The plaintiff further claims that the husband's estate was not merely a life estate but one of inheritance because the title passed to his heirs.

The defendant denies that there is dower in an equitable estate exclusive of an equity of redemption and the like, and claims that the husband had a life estate only and that he had no equitable estate in the property but merely an equitable interest in its net income.

Whether the plaintiff would come in for any share upon the division of the estate at the termination of the trust or would then be entitled to any apportionment by way of dower cannot be determined during the continuance of the trust during which the husband had no estate, legal or equitable, to which dower could attach. An equitable life interest in the income of property, the title of which is held by a trustee subject to division upon an event still in the future, cannot upon any theory give the widow of the beneficiary a present right to dower from the trust estate.

Decree affirmed.

T. M. Harrison for plaintiff.

A. L. Castle (*Castle & Withington* on the brief) for defendant.

Atherton v. Campbell, 19 Haw. 340.

CHARLES H. ATHERTON, CLINTON G. BALLENTYNE, ALFRED L. CASTLE, WILLIAM R. CASTLE, FREDERICK W. KLEBAHN, L. TENNEY PECK AND DAVID L. WITHINGTON v. A. J. CAMPBELL, TREASURER OF THE TERRITORY OF HAWAII.

SUBMISSION ON AGREED STATEMENT OF FACTS.

ARGUED JANUARY 29, 1909.

DECIDED FEBRUARY 3, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

STATUTES—*corporations*—*stare decisis*.

An ambiguous statute relating to incorporation having been construed by the court and the construction subsequently affirmed, the court will not now adopt a different construction.

OPINION OF THE COURT BY BALLOU, J.

This is a submission on an agreed statement of facts from which it appears that the plaintiffs having taken preliminary steps for organizing an association to be known as the Pearl Harbor Traction Company made application to the defendant for a charter of incorporation authorizing the carrying on of a railway and other businesses under R. L. Sec. 2542. The defendant, with the consent of the governor, refused to grant the charter on the grounds that an association for constructing and operating a railway could not be chartered under R. L. Sec. 2542, but in order to incorporate must file articles of association as prescribed by R. L. Sec. 2535, and upon the further ground that in any event the enumeration in the proposed charter of purposes included in R. L. Sec. 2535 brought the company under the provisions of that section.

The questions in difference submitted to this court are: First, has the treasurer, with the consent of the governor, power to grant a charter to a railway company? Second, are the provisions of R. L. Sec. 2535 sufficient to authorize the incorporation

Atherton v. Campbell, 19 Haw. 340.

by articles of association of a railway company? Third, can power to carry on any of the businesses or undertakings specified in R. L. Sec. 2535 be specifically granted by charter either as incidental to a power properly granted or as a separate and independent power?

It is conceded upon both sides that R. L. Sec. 2542 in its present form and R. L. Sec. 2535 are mutually exclusive, so that those associations which can be incorporated under one section cannot be under the other, this being obvious from the amendments made to R. L. Sec. 2542 upon the compilation and enactment of the revised laws in 1905. The question must then be determined by the construction to be given by R. L. Sec. 2535 reading as follows:

“Joint stock companies, for the purpose of carrying on any business or undertaking, either mercantile, agricultural or manufacturing, or buying, selling, leasing or otherwise dealing in real estate and buildings and other structures, whether used or intended to be used as shops, stores, warehouses, offices, boarding and lodging houses, hotels, or otherwise, for which individuals may lawfully associate themselves (excepting banking and professional business) shall be incorporated in the following manner and in no other.” R. L. Sec. 2535.

The ambiguity of the section is apparent. On behalf of the plaintiffs it is contended that the section covers only the kinds of business or undertakings specified, in which case the exception of banking and professional business is unnecessary and inconsistent. On behalf of the defendant it is contended that the enumeration of various particular kinds of business is illustrative rather than restrictive, a construction which is consistent with the exception of banking and professional business but renders the long enumeration unnecessary and redundant.

Viewed as a question of first impression, the construction would be one of difficulty. The statute, however, was construed by this court in 1897, and the construction reaffirmed in 1906. *Hackfeld v. King*, 11 Haw. 5; *Fitchie v. Brown*, 18 Haw. 52,

Atherton v. Campbell, 19 Haw. 340.

74. According to these decisions the section covers any business or undertaking for which individuals may lawfully associate themselves except banking and professional business, the intervening words being treated as illustrative and not restrictive. We are urged to give consideration to the fact that despite the first decision various treasurers of the Territory have continued to issue charters to railway companies, but we must also remember that during the same time many corporations not falling within the particular classes enumerated have been formed under articles of association. As held in the later decision, we do not think it would be proper now to adopt a different view of the statute.

The first question submitted is answered in the negative and the second in the affirmative. The third becomes unnecessary to consider.

David L. Withington and Alfred L. Castle for plaintiffs.

C. R. Hemenway, Attorney General, for defendant.

JOHN HODSON AND ALBERTINA HODSON v. WILLIAM WOLTERS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 16, 18, 1909.

DECIDED FEBRUARY 9, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EASEMENTS—*estoppel*—*sale of land with reference to intended roads.*

Where lots on a road shown on a map are sold with a representation that the road, then surveyed and staked out, but not taken over by the government, would be kept open, being an easy and convenient route to reach a park and from there the center of the town, the purchaser of the lots may enjoin the proposed closing of the road.

Hodson v. Wolters, 19 Haw. 342.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by defendant from a decree enjoining him from placing any obstructions on or across a portion of a certain highway known as road II running from Campbell avenue to Kanaina avenue in the Kapahulu tract near Kapiolani Park, Honolulu, and ordering him to remove certain obstructions placed thereon by him.

The evidence shows that the facts are substantially as follows: The owner of this tract of land had it platted and laid out in blocks and lots with avenues running through intersected by roads every few hundred feet, and began selling lots in the latter part of 1896 at which time the defendant bought the whole of block 9 which extends along one side of road H from Campbell avenue to Kanaina avenue, and he subsequently acquired all of the land fronting on the other side of road H between those two avenues. In the meantime plaintiffs purchased two lots on road II about a half a block up from Campbell avenue. They bought on the faith of the representations of their grantor that road II, at least between the two avenues in question, which was then staked out and surveyed, would be kept open. The grantor before selling any of the lots offered all of these avenues and roads, including the one in question, to the government for public highways, but the offer was refused by the then minister of the interior. Both plaintiffs and defendant bought with reference to a map showing the contemplated avenues and roads including road II. Roads G and I between Campbell and Kanaina avenues were under an arrangement publicly made at the first auction sale sold to purchasers of lots and closed up. It is urged that this shows that, although roads were designated on the map, there was no representation that they would be kept open. But the evidence does not warrant the conclusion that this arrangement applied to roads except G and I, and from the fact that road II and other roads were not sold it is to be in-

Hodson v. Wolters, 19 Haw. 342.

ferred that in order for owners of lots on each side of a road to close it they would have to purchase the land designated as a road. Since the tract was opened up road H, although not in good condition at any time, has been used more or less, mainly by persons on foot and some times by carriages and wagons. Plaintiffs have always used it in going to and from town and have assisted at various times in clearing off the weeds and brush so as to make it more passable. At times barriers of a more or less temporary nature have been placed across either end of the road. Plaintiffs have always insisted on their right to use the road and have removed wire fences which had been put across the ends of the road. Finally in the early part of 1908 the defendant placed obstructions of a permanent nature at each end of road H and threatened to completely close the road up. This suit for an injunction was then instituted with the result as stated.

The defendant's main contention is that where lots are sold by map or plat the purchasers acquire only an easement in the streets shown on the map which enable them to reach public highways in the most convenient manner, and that, as it is as easy and convenient for plaintiffs to reach public highways from their premises by the unclosed portion of road H and proceeding along Campbell avenue either way as through the closed portion of road H, the decree should be reversed. It is unnecessary to consider whether any other street or road shown on the map than the portion of road H in question may be closed. The shortest and most convenient method of getting to Kanaina avenue from plaintiffs' premises is undoubtedly along road H and from there to Kapiolani Park through private land. Without the privilege of crossing private land probably it is as convenient to reach the park by one road as the others mentioned. But this closed portion of road H is a continuation of the street on which plaintiffs bought lots and built and now live, is within only a half block of their house, is the shortest

Hodson v. Wolters, 19 Haw. 342.

and most practicable route to Kanaina avenue, the street car line and the center of the town, and, more than all, the representation that it would be kept open for travel induced plaintiffs and others to purchase lots on this road above Campbell avenue and thus enhanced the sale of those lots. Under such circumstances plaintiffs are entitled to have it kept open as against their grantor, purchasers from him, and grantees from them.

The defendant refers to *Pearson v. Allen*, 151 Mass. 82, *Mahler v. Brumder*, 92 Wis. 477, and many other cases, holding that where there has been a sale with reference to a plat showing contemplated roads not dedicated pursuant to statute a purchaser is entitled only to have such roads kept open that lead to the nearest public highway. The other extreme view, contended for by plaintiffs, is that under such circumstances a purchaser is entitled to have all the streets designated kept open, as held in *Wolfe v. Sullivan*, 133 Ind. 331; *Taylor v. Com.*, 29 Gratt. 780; *In re Pearl Street*, 111 Pa. St. 565, and other cases. In this conflict of authority we are not willing to adopt the rule that gives the purchaser only one road to the nearest highway. The fact that lots are sold as part of a tract intersected by numerous streets giving convenient access to all parts enhances the value of each lot, as is well understood by those who lay out such lots for sale, and a substantial closing of the proposed streets alters the entire character of the tract. We need not go so far as to hold that none of the streets shown on the map may be closed, but only that under the facts in this case the road must be kept open between Campbell and Kanaina avenues.

It is also claimed by defendant that the decree is erroneous in holding that the general public as well as plaintiffs have a right to use road H. This point was made and satisfactorily disposed of in *Rowan v. Portland*, 8 B. Mon. 232 237, which case has been approved by *Morgan v. R. R. Co.*, 96 U. S. 716.

Hodson v. Wolters, 19 Haw. 342.

The further argument suggested by defendant that, as he owns all the land on both sides of road H he therefore owns all the road in fee and may consequently close it up, has obviously no application in this case.

Where the complaining party is the public or some party not a purchaser, his rights are usually held to depend on a dedication (*Cincinnati v. White*, 6 Pet. 431), but the purchaser of a lot may rest his case on the theory of estoppel. It is therefore unnecessary to discuss other matters argued by defendant relating to statutory dedication and to the right of a private citizen to restrain a public nuisance by injunction without showing special injury.

The decree appealed from is affirmed.

C. F. Clemons (*Thompson & Clemons* on the brief) for plaintiffs.

W. W. Thayer and *M. F. Prosser* (*Kinney, Marx, Prosser & Anderson* also on the brief) for defendant.

IN THE MATTER OF THE PETITION OF J. ALFRED
MAGOON, ON BEHALF OF JOHN ATCHERLEY,
FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 10, 1909.

DECIDED FEBRUARY 11, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

HABEAS CORPUS—*insane person—appeal as supersedeas.*

An appeal in a habeas corpus case is properly advanced for hearing and the appeal operates as a supersedeas of the judgment appealed from. An appeal by the defendant lies from an order of a district magistrate committing a person to the insane asylum upon a finding by the magistrate that he is insane and that the public safety required his restraint until he became of sound

In re Atcherley, 19 Haw. 346.

mind, but pending such appeal the order may be enforced upon good cause shown under Sec. 1861 R. L.

INSANE PERSONS—*due process of law*.

Sec. 1116 R. L., authorizing the commitment of dangerous insane persons by district magistrates upon satisfactory complaint, construed in connection with Sec. 1662 R. L. giving such magistrates power to try and determine all statutory proceedings, requires a judicial trial with notice and opportunity to defend, and affords due process of law.

OPINION OF THE COURT BY HARTWELL, C.J.

Dr. John Atcherley, hereinafter named the petitioner, was brought before the district magistrate of Honolulu, January 11, last, under Sec. 1116 R. L., upon the sworn complaint of doctors Emerson and Sinclair that he was "insane and that the public safety requires his restraint until he becomes of sound mind, or is ordered to be discharged as by law provided and required." The magistrate, after hearing evidence of witnesses for the prosecution, who were cross-examined at length by the petitioner and his attorney, and of the petitioner's witnesses, on January 27 found that he was "insane and that the public safety requires his restraint until he becomes of sane mind," and committed him to the insane asylum. The petitioner thereupon applied to the third judge of the first circuit court and obtained an order releasing him from the custody of the superintendent of the asylum, which order was the same day rescinded. The following day, January 28, upon petition of the petitioner's attorney, the judge issued a writ of habeas corpus and after hearing the parties upon the return to the writ, which was not traversed, setting forth the proceedings above recited before the magistrate, made an order, January 30, that, on the ground of the unconstitutionality of the statute, the petitioner be released. From this order the superintendent appealed and February 6 moved that the cause be advanced for hearing and that the court make an order providing for custody of the petitioner

In re Atcherley, 19 Haw. 346.

pending decision of the cause. The motion was heard February 8, the petitioner appearing in person and by his attorney and argument was set for February 10, the high sheriff being directed to hold the petitioner in custody at his home until further order of court under Sec. 2079 R. L.

The court held in *Ex parte Ah Oi*, 13 Haw. 534, that under the general statute an appeal lies in habeas corpus cases, saying (p. 539), with reference to persons discharged and still in custody, "the appeals would seem to operate as a supersedeas in these as in other cases by the provisions of Section 71 of the Act of 1892." (Sec. 1861 R. L.) It was also held in that case (p. 540), of the provision (Sec. 2084 R. L.), "No person who has been discharged upon a writ of habeas corpus shall be again imprisoned or restrained for the same cause," etc., that "A prisoner is not discharged within the meaning of this clause until his case is finally determined." This appears to us to be the only way in which the appeal can be made effective in such cases, and accordingly we so rule.

The petitioner contends that the statute was unconstitutional under which he was committed to the insane asylum upon the finding of the magistrate that he was insane and that the public safety required his restraint until he became of sound mind or was ordered to be discharged as by law provided inasmuch as the statute fails to require notice to be given him of the charge and an opportunity to defend himself against it, this being claimed to be essential to securing the right of personal liberty by due process of law.

The respondent urges that in practice the statute always has been construed as requiring such notice and opportunity to be given and that this is a reasonable and proper construction, but that if, notwithstanding the practice, the court, in view of the wording of the statute, does not feel justified in so construing it then Sec. 1118 R. L., giving circuit judges power to discharge any person confined in the asylum upon application to them,

In re Atcherley, 19 Haw. 346.

if upon examination they should be satisfied that such person is of sound mind, affords full protection to personal liberty within the meaning of constitutional requirements as was held in *Dowdell, Petitioner*, 169 Mass. 387.

There is no occasion, however, to discuss the various decisions which are cited for and against these views since the authority of district magistrates "in all statutory proceedings" is defined by the statute, Sec. 1662 R. L., as jurisdiction "to try and determine the same, subject to appeal according to law." There cannot be a judicial trial and determination of the facts in issue unless the party proceeded against is notified of the charge and given an opportunity to be present at the trial, cross-examine witnesses produced against him and present any legal evidence affecting the issue to be tried, this being the essential meaning of the words in the statute conferring upon the magistrate power to hear any complaint against the petitioner and the two statutes taken together effectively disposing of objection to the unconstitutionality of Sec. 1116 R. L. when taken alone. "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form." *Simon v. Craft*, 182 U. S. 428, 436.

It therefore follows that the district magistrate's order of commitment was valid, and the only question remaining is as to the proper custody of the petitioner pending his appeal from that order, his right to an appeal being clear not only from the broad construction given to the general statute in *Ex parte Ah Oi*, 13 Haw. 534, but from the specific language of Sec. 1662 R. L. Under Sec. 1861 R. L. an appeal duly taken and perfected operates as a supersedeas, subject to the power of the district magistrate, upon good cause shown, to allow appropriate action to be taken for the enforcement of his order pending appeal, as provided in that section. The petition in this case recites that an appeal in writing was duly noted but does not

In re Atcherley, 19 Haw. 346.

state that it was perfected. Upon the record before us, therefore, the petitioner should be remanded to custody under the order of commitment, and it is so ordered.

J. A. Magoon for petitioner.

C. R. Hemenway, Attorney General, and J. W. Cathcart, County Attorney, for respondent.

CHARLES T. WILDER, ASSESSOR AND COLLECTOR
OF TAXES IN AND FOR THE FIRST TAXATION
DIVISION OF THE TERRITORY OF HAWAII v.
W. T. LUCAS.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED FEBRUARY 11, 1909.

DECIDED FEBRUARY 15, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

TAXATION—*statutes—tax liens.*

S. L. 1905, Act 89, Sec. 16 does not extend the duration of tax liens which had attached prior to the date that the act took effect.

OPINION OF THE COURT BY BALLOU, J.

This is a submission upon an agreed statement of facts from which it appears that the defendant in December, 1908, became the purchaser at foreclosure sale of real estate mortgaged in 1898, upon which the taxes for the year 1905 are still unpaid. The plaintiff contends that the property is subject to a lien for the taxes for that year superior to the prior mortgage, and the following questions are submitted for decision:

"1. Do the provisions of Section 16 of Act 89 of the Session Laws of 1905, amending Section 1266 of the Revised Laws of Hawaii (1905), operate to extend the term of the lien of taxes for the year 1905 from the term of two years to five years?"

Wilder v. Lucas, 19 Haw. 350.

"2. If the previous question be answered in the affirmative: Do the provisions of said Section 1266, as so amended, operate to make the lien of said taxes so assessed upon said property for the year 1905, prior or superior to the lien of said mortgage; or, was such tax lien divested by said foreclosure?"

R. L. Sec. 1266, in force during the year 1905, reads as follows:

"Every tax due upon property shall be a lien upon the property assessed; and every tax due upon improvements upon real property assessed to others than the owner of the real property, shall be a lien upon the improvements; which several liens shall attach as of September 1 in each assessment year, and shall continue for two years."

This section was amended by S. L. 1905, Act 89, Sec. 16, to read as follows, the entire amending act taking effect January 1, 1906:

"Section 16. Section 1266 of the Revised Laws of Hawaii is hereby amended so as to read as follows:

"Section 1266. Tax Liens. Every tax due upon property shall be a prior lien upon the property assessed; and every tax due upon improvements upon real property assessed to others than the owners of the real property, shall also be a prior lien upon the improvements; which several liens shall attach as of January 31 in each assessment year, and shall continue for five years.

"Said liens may be enforced and foreclosed upon the petition of the tax assessor to the circuit judge at chambers in the judicial circuit in which said property lies or is held, and jurisdiction is hereby conferred upon said circuit judges at chambers to hear and determine all proceedings brought or instituted to enforce and foreclose such tax liens, and the proceedings had before said circuit judge at chambers shall be conducted in the same manner and form as ordinary foreclosure proceedings.

"For the purpose of foreclosing and enforcing any tax lien under this section, every tax has the effect of a judgment against the person and every lien created by said section has the force and effect of an execution duly levied against the property of the delinquent returned unsatisfied."

Wilder v. Lucas, 19 Haw. 350.

While it is true, as contended by plaintiff, that the amending act does not impair liens already existing, it does not necessarily follow that such liens are thereby extended from two to five years. There is nothing in the language of the statute to indicate such intent. The lien for the taxes of 1905 attached September 1, 1905, and continued for two years; the lien for the taxes of 1906 attached January 31, 1906, and continues for five years. Statutes providing additional remedies for the collection of taxes will not be applied to taxes previously laid unless such intent is manifest. *Fuller v. Grand Rapids*, 40 Mich. 395.

The first question is answered in the negative, and consideration of the second question becomes unnecessary.

E. W. Sutton, Deputy Attorney General, for plaintiff.

L. J. Warren (Smith & Lewis on the brief) for defendant.

TERRITORY OF HAWAII, EX RELATIONE, CHARLES
COSTER, v. R. H. TRENT AS TREASURER OF THE
CITY AND COUNTY OF HONOLULU, TERRI-
TORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 25, 1909.

DECIDED MARCH 1, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

MUNICIPAL ACT—*appointing power*.

Under the Municipal Act (Act 118 S. L. 1907) the board of supervisors has no power to appoint or employ employees of the road department.

MUNICIPAL ACT—*power of treasurer*.

Under Sec. 138 of the Municipal Act the city and county treasurer may refuse to pay a warrant based on an illegal claim.

Coster v. Trent, 19 Haw. 352.

OPINION OF THE COURT BY HARTWELL. C.J.

This is an appeal by the defendant from an order of the circuit judge for a peremptory writ of mandamus and from the writ commanding the defendant to pay to the plaintiff the sum of \$30.15 upon a warrant in his favor issued by the auditor of the city and county of Honolulu, hereinafter referred to as the city, payable out of the appropriation made by the board of supervisors for Maintenance of Roads Honolulu District, Pay Roll, and being plaintiff's wages at \$85 a month fixed by the board of supervisors for his service as foreman of the fourth district stables maintained by the city in connection with the care and maintenance of its public roads. The plaintiff was employed by supervisors Quinn, Aylett and Kane, the board's committee on roads, bridges, garbage, parks and public improvements. The defendant's objection to paying the warrant was that the plaintiff was not lawfully employed by the committee of the board.

The pleadings and briefs are voluminous, reciting the proceedings of the board of supervisors, an opinion of the city and county attorney and a letter or message to the board by the mayor giving his version of the law, but when everything possible is written and said on the subject the controversy comes down to the question whether under the municipal act the board of supervisors has power to select and engage employees as well as to fix their wages for public service in connection with the care and maintenance of the public highways, for if it has not this power it cannot delegate it nor can the power be evolved from or based upon any legislative act, ordinance, rule of procedure or resolution of the board whatsoever.

The evidence was properly rejected which the defendant offered to show the purpose of the action taken by the board of supervisors of the county of Oahu on January 4, 1909, just before the hour of noon when its office expired, in abolishing all "boards, committees, commissions, officers, positions and employ-

Coster v. Trent. 19 Haw. 352.

ments heretofore created" by it and repealing "all motions, votes, orders, resolutions, rules and regulations creating or tending to create" the same, as well as "the rules and regulations heretofore adopted by this board and now in force."

The petition showing that in this case the warrant had been examined, allowed and ordered paid the plaintiff contends that under *McClanahan v. Trent*, 17 Haw. 190, 193, there is no "power which the treasurer himself has to decline to pay a warrant which has been 'legally examined, allowed and ordered paid by the board of supervisors,' as the law does not constitute him an authority to scrutinize the acts of the board and to pay or refuse to pay warrants in payment of claims passed by the board according, as in his opinion, the action of the board was legal or illegal." The opinion goes on to state: "The only way in which payment of an unauthorized, fraudulent or illegal claim can be prevented after a warrant has been issued by the auditor would be by an injunction of a court having jurisdiction of such matters; but no illegality, fraud or lack of authority appears in this case." The defendant insists that since under Sec. 138 of the Municipal Act (which is Act 118 S. L. 1907), which was not in the County Act, he would be liable to the city and county and on his bond if he "pay any demand on the treasury not authorized by law, ordinance or this charter," "he has the power to refuse to pay if he thinks that the claim is illegal." In *Lyman v. Maguire*, 17 Haw. 142, refusal to grant a writ of mandamus to compel the auditor of the county to issue a warrant on the treasurer in payment of a claim for salary as sheriff's clerk was affirmed, the court holding that "a county auditor has the right in a proper case to question the validity of claims allowed and ordered paid by the board of supervisors," and that the claim in that case was not a lawful claim.

Upon the whole we are of opinion that Sec. 138 authorizes the treasurer to refuse payment of a warrant based upon a claim which in his opinion is unlawful, otherwise the provision meant

Coster v. Trent, 19 Haw. 352.

to restrain illegal use of municipal funds would be inoperative.

Sec. 4 of the Municipal Act gives to the city all the powers of every description of the then existing county of Oahu and declares that the municipality is the successor of the said county. Sec. 3 of the County Act gave the county supervisors power "to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries." Under this power, thus transferred to the city, the selecting, engaging and employment of persons to perform the service required in maintaining public highways become necessary. The board of supervisors has express power under Sec. 23 of the Municipal Act "To fix the hours of labor or service required of all employees and laborers in the service of the City and County, and to fix their compensation." But who are to employ the laborers or employees, the supervisors, whose general functions, as defined by the act, are legislative, or the mayor who is made by the act the chief executive officer? The division or apportionment of public work is conveniently and properly made according to the nature of the service required, as, for instance, maintaining roads and bridges and clearing streets would naturally come under one head, sanitation and health another, and so on. Each head, subdivision or department requires, in order that it receive proper attention, some one or more persons to be placed in charge authorized to employ men to do the work required to be done. Under the County Act the board of supervisors appointed the persons in charge of each department and the chiefs of departments so appointed engaged and looked after the employees, the chiefs of the departments being subordinate officers of the board under the power expressly given to the board by Par. 2 of Sec. 62 of the County Act (Act 39 S. I. 1905): "To appoint such subordinate officers as they may deem necessary for the public service," but this power is not given to the board of supervisors by the Municipal Act. If this power were not otherwise placed by the act it might be implied, as con-

Coster v. Trent, 19 Haw. 352.

tended by the plaintiff, from the power to maintain roads, but the act, Sec. 81, gives to the mayor the power of appointing, with the approval of the board, all officers whose appointment is not otherwise specially provided for in the act or by law.

According to the plaintiff's theory this power would be confined to the appointment of the mayor's own secretary, no other officers being specifically mentioned, with the possible exception of inspectors of elections. According to the theory of the defendant most relied upon, the officers referred to are those not specifically named in the act but actually existing under the county government, particularly those whose offices were created under territorial law and who continued to exercise corresponding functions under the County Act. These, according to defendant's contention, would be appointed by the mayor, with the approval of the board of supervisors, and would naturally and by necessary implication have the selecting of their own employees.

There are parts of the act which are inconsistent with either theory, but we are of the opinion that the decided preponderance of argument supports the contention of the defendant. The power to select employees might, in the absence of any other power, be inferred from the power given the supervisors "To make contracts and to do all things necessary and proper to carry into execution the foregoing powers and all other powers vested in said City and County or in any officer thereof" (Sec. 23 Par. 20), but such construction seems forced and unnatural. It is admitted that the enumeration of city and county officers in Secs. 24, 35 and 39 is not exhaustive, the existence of others being implied in Secs. 17, 27, 81, 131, 141 and 146. "Departments" though not specifically created are frequently referred to and their power to employ subordinates and employees is assumed in Secs. 135 and 145. This last section, providing for the procedure when additional employees are required, is of especial significance. The supervisors upon the recommenda-

Coster v. Trent, 19 Haw. 352.

tion of the mayor authorize the appointment of additional employees and provide for their compensation; the appointments are made by the officer, board or department requiring them. This seems incompatible with the appointment of employees by the supervisors.

The plaintiff in this case does not bring himself within the class of employees employed by a de facto officer holding a legal office with the power of appointment. He claims solely under his appointment by the committee of the supervisors, ratified by the board. We are of the opinion that his employment was without authority of law and that he has no legal claim to his wages.

The order appealed from is reversed and the case remanded with instructions to dismiss the petition and alternative writ.

J. W. Cathcart, City and County Attorney, and F. W. Milverton, First Deputy City and County Attorney, for plaintiff.

W. A. Kinney (E. M. Watson with him on the brief) for defendant.

HARRY T. MILLS v. J. D. MENDONCA.

ERROR TO DISTRICT MAGISTRATE OF HONOLULU, OAHU.

ARGUED FEBRUARY 24, 1909.

DECIDED MARCH 1, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CONTRACTS—*consideration—compromise of doubtful claim.*

An agreement by the defendant to pay a certain sum as the value of a horse claimed to have been killed by defendant's horse is based upon sufficient consideration.

OPINION OF THE COURT BY BALLOU, J.

The plaintiff as assignee of the claim of Sun Wah Kee brought suit before the district magistrate of Honolulu alleging

Mills v. Mendonca, 19 Haw. 357.

that the defendant was indebted to Sun Wah Kee in the sum of \$35 for the price and value of a certain horse injured and killed by and through said defendant, the defendant agreeing to pay the sum of \$35, the agreed value of said horse, and being so indebted the defendant afterwards undertook and faithfully promised to pay said \$35 upon request; with allegations of demand and refusal, except as to \$5 which had been paid on account. Afterwards the plaintiff amended by adding a second count alleging an account stated, and obtained judgment for \$30, with interest and costs. The defendant brings this writ of error.

The declaration does not state an action in tort and the assignment of error alleging misjoinder of tort and contract was properly abandoned in this court. There was no evidence of an account stated, which must be predicated upon previous transactions of a monetary character, but there is abundant evidence to sustain the first count. According to the testimony given for the plaintiff the horse of Sun Wah Kee was kept in the same yard with a horse of the defendant and one morning was found dead. Sun Wah Kee went to the defendant and claimed that the defendant's horse had killed his horse by kicking it, and demanded payment of \$50. After some bargaining the defendant agreed to pay \$35 and afterwards paid \$5 on account.

The defendant's promise being in compromise of a doubtful and unliquidated claim in tort was given upon sufficient consideration and the agreement was binding upon both parties. 6 A. & E. Enc. Law 711, 715. It was neither necessary nor proper to prove at the trial of this case whether the circumstances justified the original claim or not, the modern and better rule being that the compromise of even a groundless claim, so long as it is bona fide, is consideration. *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. In this case the facts that the claim was made in good faith, and \$5 paid upon it are undisputed,

Mills v. Mendonca, 19 Haw. 357.

and the district magistrate found the agreement for settlement to be as testified to by the witnesses for the plaintiff. We find no error in the record.

The judgment is affirmed.

A. S. Humphreys for plaintiff.

J. A. Magoon for defendant.

MARY KAPOLA KALEIKINI *v.* ALBERT WATERHOUSE, ADMINISTRATOR OF THE ESTATE OF A. KAUI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 1, 1909.

DECIDED MARCH 11, 1909.

HARTWELL, C. J., WILDER AND BALLOU, JJ.

EVIDENCE—*admissions against interest.*

An account book shown to be in the handwriting of a deceased person is admissible in support of a claim against his estate as an admission against interest.

ACCOUNT—*concurrent jurisdiction of law and equity.*

An action of assumpsit having been brought at law, it is not a ground for nonsuit that it is founded on a long and complicated account.

LIMITATION OF ACTIONS—*principal and agent.*

In the absence of a demand, the statute of limitations does not begin to run in favor of a fiduciary agent managing his principal's estate until the death of one party.

OPINION OF THE COURT BY BALLOU, J.

Plaintiff brought an action of assumpsit in the circuit court for the sum of \$13,389.10. The testimony showed that the plaintiff when a very young child was taken charge of by an old couple, Keakaku and Paahao, and brought up as their daughter,

Kaleikini v. Waterhouse, 19 Haw. 359.

although not legally adopted. They all lived together with the decedent Kauhi, at Ewa. Some time before the death of this old couple the plaintiff was given into the charge of Kauhi together with some property and money to be kept for the benefit of the child. From that time on and throughout his life Kauhi acted as a father towards the plaintiff, assumed entire control of her property, leased her lands, collected rents and made investments for her. Plaintiff married in 1888 at the age of fourteen, but Kauhi continued to manage plaintiff's property with her full acquiescence and confidence up to the time of his death in February 1907. Upon the defendant's appointment as administrator plaintiff filed a claim upon which this action was brought, and after trial by a jury recovered judgment for \$7200.

Defendant's first group of exceptions relate to the admission in evidence of the pages of an old account book of Kauhi dealing with the plaintiff and her affairs. The accounts, which were proved to be in the handwriting of Kauhi, are contained in a book devoted in part to other matters, such as lists of tax collections. Some of the pages dealing with plaintiff's affairs are headed as follows: Page 47, "Memorandum of my debts to Mary Kapola;" page 48, "For Mary Kapola," showing a list of loans made for her; page 53, "Memorandum of the time to collect rents from the lands of Mary Kapola;" page 62, "People owing money to M. Kapola." The accounts are somewhat rough and confused, with many erasures, particularly of items marked paid, but it is not necessary to consider whether or not they sufficiently fulfil the requisites of a regular book of entry which would entitle them to be used in support of a claim by the decedent. The accounts were offered and received in support of the claim against the decedent, they being admissions against interest. As such they were clearly competent evidence. 2 Wigmore Evidence, Sec. 1557.

There is no merit in the exception to the refusal of the judge

Kaleikini v. Waterhouse, 19 Haw. 359.

to order a nonsuit upon the ground that the account was long and complicated and therefore a case for a court of equity. Actions for accounting are within the concurrent jurisdiction of law and equity and the one first taking actual cognizance of any particular controversy ordinarily retains exclusive jurisdiction. 1 Pomeroy Eq. Juris., Secs. 174, 179. Even if the case were one falling within the jurisdiction of equity as defined by R. L. Sec. 1834, which is by no means certain (see *Government v. Brown*, 6 Haw. 750), the remedy would be by application to a court of equity, not by motion for nonsuit.

There is no error in the refusal to strike out all evidence in regard to accounts prior to six years before the death of Kauhi on the ground that such accounts were barred by the statute of limitation. The evidence shows that Kauhi acted in a fiduciary capacity as the plaintiff's confidential agent up to the time of his death, and no demand for an accounting is alleged to have been made during his lifetime. Under these circumstances the statute begins to run only from the date of Kauhi's death. *Burdick v. Garrick*, L. R. 5, Ch. 233.

The last exception of the defendant was to the following instruction: "If you find from the evidence that Kauhi took this girl and treated her as his own child, and she acted towards him as she would towards her own natural father, and he cared for her, educated her, clothed her, fed her, gave her a home, and if you find that there is no evidence upon which there can be any express or implied agreement upon her part to pay for lodging, her food, her clothing, and otherwise caring for her, the law will then presume this relationship of parent and child and would not imply that she was under any legal obligations to pay him therefor.

"However, if you find from the evidence that such relationship really did not exist between the parties, but that she was under legal obligations to pay for her food, clothing and care, etc., then of course the reasonable amount of that would be

Kaleikini v. Waterhouse, 19 Haw. 359.

deducted from whatever claim you might find that she has against the estate.

“The Court is not permitted to comment upon or give its conclusion or opinion as to what I might think of those matters; you are to draw your own conclusions. I will say, however, in considering this latter phase of the matter in regard to the relationship that may or may not have existed between them as to parent and child, you may take into consideration the fact that Kauhi used her property, if you find from the evidence that he did so use it, or derived any benefit from it; if so, I think you would be justified in taking into consideration the comfort, enjoyment of her society, etc., as a parent would with a child, even though possibly the actual relationship did not exist. I am justified in saying, however, that there is no evidence showing any express contract between the parties that she was to pay for these things.”

The statement that there was no evidence of any express contract that the plaintiff was to pay for her lodging, food and clothing is sustained by the record, and is not a comment upon the evidence within the prohibition of the statute. R. L. Sec. 1798. The statement of law as to the circumstances under which such contract might be implied was full and accurate.

The exceptions are overruled.

W. C. Achi for plaintiff.

C. F. Peterson for defendant.

Ching Lum v. Lam Man Beu, 19 Haw. 363.

CHING LUM v. LAM MAN BEU.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 24, 1909.

DECIDED MARCH 15, 1909.

HARTWELL, C. J., WILDER AND BALLOU, JJ.

EVIDENCE—*cross-examination*.

A witness may be cross-examined as to matters brought out on direct examination which would otherwise be inadmissible.

MALICIOUS PROSECUTION—*advice of counsel*.

In malicious prosecution the defendant may show that in causing the arrest of plaintiff he acted on the advice of counsel.

EVIDENCE—*translation of interpreter*.

In order to impeach a witness the English translation of evidence which he gave in Chinese through an interpreter at a former trial cannot be testified to by one unacquainted with the Chinese language, even though the interpreter was absent from the jurisdiction, at least until it appears that there was no one else available who could testify to what the witness said in Chinese.

MALICIOUS PROSECUTION—*instructions—probable cause*.

In malicious prosecution an instruction that "A person commencing a prosecution for a crime committed against his person or property is not required to act with the same impartiality and freedom from prejudice in drawing his conclusions as to the guilt of the accused as a person entirely disinterested would be," in addition to other proper instructions as to probable cause, is not erroneous.

OPINION OF THE COURT BY WILDER, J.

This is an action for malicious prosecution in which a verdict was rendered for defendant. Plaintiff comes to this court on exceptions.

The first exception is that defendant's counsel was allowed to ask plaintiff on cross examination the following question: "Is it not a matter of fact that you are a doubly married man, that you have one wife in China and one here?" The objection was that it tended to prejudice plaintiff in the eyes of the

Ching Lum v. Lam Man Beu. 19 Haw. 363.

jury. Plaintiff, however, in answer to a question by his counsel had stated on his direct examination that he was a married man. Under such circumstances the question was proper.

The fourth exception is to the denial of plaintiff's motion to strike out an answer by Mr. Withington, an attorney, in response to a question as to a conversation between him and defendant which preceded the arrest of plaintiff on a charge of assault and battery for the malicious prosecution of which this action was instituted. The attorney was put on the stand for the purpose of showing that in the matter complained of defendant had acted on the advice of counsel. The motion was properly denied. *Sylva v. Cockett*, 12 Haw. 133.

Exceptions five and six relate to the admissibility of evidence tending to impeach the defendant who was asked if he had made certain statements in the district court on the trial of the assault and battery case inconsistent with his testimony on those points in this case which he denied. The testimony of the defendant in the district court was in the Chinese language and all that the witnesses in this case could testify to was the English translation by the Chinese interpreter, the interpreter himself being absent from the jurisdiction at the time of this trial. It is not claimed that the interpreter was the agent of the defendant while testifying. It is conceded that the general rule is that such testimony is not admissible, but it is claimed that in the absence of the interpreter from the jurisdiction, thus rendering him unavailable, such evidence is allowable, citing particularly *Schearer v. Harber*, 36 Ind. 536, and 3 Wigmore Ev., Sec. 1810. In the Indiana case it was not shown why the interpreter was not called as a witness and consequently it was held that the evidence was erroneously admitted. The opinion went further, however, and stated obiter that, if it had been shown that the interpreter was absent from the jurisdiction, persons unacquainted with the language used could testify as to the translation. Professor Wigmore inclines to the

Ching Lum v. Lam Man Beu, 19 Haw. 363.

same view on the theory that the interpreter is in the same class as the witness, apparently overlooking the fact, however, that, as it is only at the subsequent trial that the witness testifies differently from the translation at the first trial, there has been no opportunity for the cross examination of the interpreter on that issue, which as he points out in Sec. 1395 of his work is essential. This testimony does not strictly come within any of the recognized exceptions to the hearsay rule (2 Wigmore Ev. Sec. 1426). It may be inferred, however, that the translation is trustworthy from the fact that it was given by a sworn officer of the court and under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected. If in addition to this it appeared that there was a necessity for the reception of this testimony, that is, that it could not otherwise be shown, (2 Wigmore, Sec. 1421,) it may be that it should be allowed. But in this case there was no attempt made to show that no one else was available who could testify as to what the witness said in Chinese. Therefore we think there was no error in refusing to admit the testimony.

Exception eight is to the following instruction to the jury which the court gave at the request of defendant: "A person commencing a prosecution for a crime committed against his person or property is not required to act with the same impartiality and freedom from prejudice in drawing his conclusions as to the guilt of the accused as a person entirely disinterested would be." This was not erroneous, (*Cole v. Curtis*, 16 Minn. 182,) particularly when taken in connection with other instructions as to probable cause, as set out in *Phillip v. Waller*, 5 Haw. 609, 613, which were given.

The last exception is that the verdict was contrary to the law and the evidence and the weight of evidence. A perusal of all of the evidence shows that the verdict was justified.

This disposes of all of the exceptions which were argued.

Ching Lum v. Lam Man Beu, 19 Haw. 363.

Exceptions overruled.

J. Lightfoot for plaintiff.

D. L. Withington and *J. W. Carthcart*, (*Castle & Withington* also on the brief,) for defendant.

W. R. KALAEOKEKOI v. WAILUKU SUGAR CO.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 26, 1909.

DECIDED MARCH 19, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EJECTMENT—*venue may be changed.*

In an action of ejectment the venue may be changed. R. L.
Secs. 1647, 1649.

OPINION OF THE COURT BY WILDER, J.

(Ballou, J., dissenting.)

This is a reserved question from the first circuit court to determine whether that court has jurisdiction to try and determine an action of ejectment for land situated in the second circuit which was instituted in that circuit and with the consent of both parties transferred to the first circuit court.

The statutes involved are as follows:

“The several circuit courts shall have jurisdiction * * *
as follows: * * *

“First. Of all criminal offenses cognizable under the laws of the Territory, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;

“Second. Of all suits for penalties and forfeitures incurred under the laws of the Territory;

Kalaeokekoi v. Walluku Sugar Co., 19 Haw. 366.

“Third. Of all causes, civil or criminal, that may properly come before them on appeal from any other court according to law;

“Fourth. Of all civil causes at law, except as otherwise expressly provided;

“Fifth. Any circuit court may, upon satisfactory proof that a fair and impartial trial cannot be had in any case pending in such court, and after the parties thereto shall have had opportunity to be heard, change the venue to some other circuit court and order the record to be transferred thereto; provided, however, that any circuit court may, in its discretion, upon the consent of all the parties to any civil cause pending in such court, change the venue to some other circuit court and order the record to be transferred thereto.” R. L. Sec. 1647.

“The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:

“First. To hear and determine all matters in equity;

“Second. To hear and determine all matters of divorce, separation and annulment of marriage;

“Third. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates;

“Fourth. To admeasure dower and partition real estate; when the dower in real estate cannot be set apart without great injury to the owners, the judge may ascertain the value of such dower in money, and order the same to be paid on such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the judge may order a sale of the premises and divide the proceeds;

“Fifth. To legalize the adoption of children and to decree the affiliation of bastards;

“Sixth. To select and impanel, subject to challenge for cause, by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo*, or in any other matter to be tried before.

Kalaeokekoi v. Walluku Sugar Co., 19 Haw. 366.

any of the said judges at chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require;

“Seventh. To issue writs of habeas corpus according to law;

“Eighth. To issue writs of error, certiorari, mandamus, ne exeat, prohibition and quo warranto, and all other writs and processes according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law;

“Ninth. To enlarge on bail persons rightfully confined in all bailable cases;

“Tenth. To require either the plaintiff or defendant, upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the judge shall deem just;

“Eleventh. To issue warrants for the apprehension, in any part of the Territory, of any person accused under oath of a crime or misdemeanor committed in any part of the Territory and to examine and commit such person to prison according to law, for trial before the circuit court of the circuit in which the offense was committed, to fix bail and generally to perform the duties of a committing magistrate.” R. L. Sec. 1648.

“Provided, however, that the power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as hereinbefore defined, shall be limited as follows:

“First. Causes described in the second division of section 1647 shall be triable only in the circuit where it is alleged the penalty or forfeiture was incurred;

“Second. Actions of ejectment, actions to quiet title in real property and actions of trespass quare clausum fregit shall be triable only in the circuit in which the real property in question is situated;

“Third. Causes of divorce, separation, and nullity of marriage, shall be triable only in the circuit where the parties last lived together as man and wife, or, if they have not last so lived together in this Territory, in the circuit in which the applicant resides;

“Fourth. Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates

Kalaeokekoi v. Walluku Sugar Co., 19 Haw. 366.

of deceased persons, shall be brought only in the circuit where the deceased had his last domicile. Provided, that if the deceased was last domiciled without this Territory, the proceedings may be brought in any circuit in which there is estate to be administered;

“Fifth. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun. Provided, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any circuit in which there is estate of such person or persons;

“Sixth. Proceedings for the partition of real estate shall be brought only in the circuit where the real estate, partition of which is prayed for, is situated. Provided, that if such real estate lies in more than one circuit the proceedings may be had in any circuit court in which the same or any part thereof is situated;

“Seventh. Proceedings for legalizing the adoption of children and decreeing the affiliation of bastards, shall be brought in the circuit in which the parents, or either of them, of the children in question reside. Provided, that if, in case of adoption, such parents are deceased or if neither of them resides within the Territory the proceedings may be brought in the circuit in which the adopting parent or parents reside;

“Eighth. The power of issuing writs of error and other writs specifically named in the eighth subdivision of section 1648 shall be in the judge of the circuit in which the alleged occasion for relief by any such writ shall arise. Provided, however, that in case any such writ shall be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any circuit court or judge, the power of issuing such writ shall be in the court or judge before whom such case or proceeding has been begun or is pending, even though the alleged occasion for relief shall have arisen in another circuit.”
R. L. Sec. 1649.

Sec. 1647 was originally a part of the judiciary act of 1892 and the second subdivision of Sec. 1649 was enacted in 1898

Kalaeokekol v. Walluku Sugar Co., 19 Haw. 366.

with another clause in regard to torts, which last clause was dropped out in 1903.

It may be observed in the first place that so far as this question is concerned there seems to be no difference whether the action is transferred with the consent of both parties or because a fair and impartial trial cannot be had in the circuit where the action was instituted.

That the second subdivision of Sec. 1649 is a limitation is clear. The question is whether, as contended by plaintiff, it is a limitation on subdivision five of Sec. 1647. It certainly does not limit the second subdivision of Sec. 1647, referring to suits for penalties and forfeitures, as that matter is specifically referred to in Sec. 1649. Likewise it does not limit the first subdivision of Sec. 1647, which refers to criminal offenses, or the third subdivision, which refers to cases coming to the circuit court on appeal, as ejectment is neither a criminal offense nor is it brought to a circuit court on appeal. It undoubtedly limits the provisions of the fourth subdivision. It does not expressly refer to subdivision five in regard to change of venue, and it cannot be held that it impliedly limits the power there contained when the whole of the section is considered. As we construe the two sections together their meaning is that circuit courts have jurisdiction of all civil causes at law provided that actions of ejectment shall be triable only in the circuit in which the property is situated, leaving in full force the power to change the venue in such cases. Sec. 1649 contains eight subdivisions, each of which expressly refers to and limits the power conferred by some particular subdivision in the two preceding sections. The effect is the same as if each subdivision of Sec. 1649 was annexed to the one to which it refers in the preceding two sections. Moreover, the court should be slow in adopting a construction which would eliminate the salutary provision for a change of venue in certain jury cases when there is another reasonable construction without that sequence.

Kalaeokekoi v. Walluku Sugar Co., 19 Haw. 366.

Reference is made to *Kapiolani Estate v. Territory*, 18 Haw. 460, 461, as implying that venue cannot be changed in ejectment cases. The language used there was, "Assuming but not deciding that an action to quiet title in real property is triable only in the circuit in which the real property in question is situated and that the venue of such an action cannot be changed it does not follow that the venue of this action (one to establish a fishing right) cannot be changed." The opinion in that case shows that the assumption was for purposes of argument only, and that no such implication as claimed was intended.

A good deal was said by both sides as to the established practice in regard to changing venue in ejectment cases. We cannot say that any definite practice has been established one way or the other, although so far as this court is concerned the reports show at least three opinions where it must have been assumed that venue could be changed in ejectment cases. *Spreckels v. De Bolt*, 16 Haw. 476; *Spreckels v. Brown*, 18 Haw. 91; *Kalaeokekoi v. Walluku Sugar Co.* 18 Haw. 380.

The reserved question is answered in the affirmative.

C. W. Ashford for plaintiff.

R. B. Anderson (*Kinney, Marr, Prosser & Anderson* on the brief) for defendant.

CONCURRING OPINION OF HARTWELL, C. J.

Concurring in the decision of the court I will state why I regard the statute as allowing the circuit court to change the venue.

By Sec. 1647 R. L. circuit courts have jurisdiction (1) of all criminal offenses committed within their circuits or transferred to them for trial from some other circuit; (2) of all suits for penalties and forfeitures; (3) of all causes, civil or criminal, appealed from any other court according to law (that is, from the district courts); (4) of all civil causes except as otherwise expressly provided (meaning, of course, when other

Kalaeokekoi v. Walluku Sugar Co., 19 Haw. 366.

express provisions are not made for their trial, as, for instance, in civil causes of which the supreme court may have exclusive original jurisdiction); (5) and may change the venue to some other circuit court (a) when a fair trial cannot be had before it and (b) upon the consent of the parties.

By Sec. 1649 the power and jurisdiction of circuit courts relating to civil causes is limited as follows: (1) Suits for penalties and forfeitures shall be triable only in the circuit where they were incurred; (2) actions of ejectment to quiet title and for trespass quare clausum are triable only in the circuit in which the real property in question is situated; (3) divorce cases are triable only in the circuit where the parties last lived together as man and wife or in the circuit in which the applicant resides if both had not lived together in the Territory; (4) probate of wills, appointment of administrators, admeasurement of dower and matters relating thereto, only in the circuit where the decedent last lived; matters of guardian and ward, only in the circuit in which the person in whose behalf the proceeding was brought is domiciled; (6) partition matters, only in the circuit where the real estate is situated; (7) adoptions, in the circuit in which the parents or either of them reside; (8) the power to issue writs of error, certiorari, mandamus, ne exeat, prohibition and quo warranto is in the judge of the circuit in which the occasion for the relief sought shall arise.

The question is whether the prohibition in subdivision two, Sec. 1649, of trying ejectment causes except in the circuit in which the land be situated limits the power in subdivision five, Sec. 1647, to change venues, or the power in subdivision four, Sec. 1647, to try all civil cases the trial of which is not otherwise expressly provided for.

In the *Martello* case, 19 Haw. 243, holding that parties in a divorce case could not by mutual consent have their case tried in any other circuit than where they last lived together, the plaintiff relied upon *Central Trust Co.* case, 151 U. S. 129,

Kalaeokekol v. Wailuku Sugar Co., 19 Haw. 366.

which held that where a defendant corporation voluntarily submitted to the jurisdiction of a circuit court by pleading to the merits this was a waiver of its privilege of being sued in the district of its domicile, and the *Schollenberger* case, 96 U. S. 369, holding that the act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of courts. We considered that the judge was right in refusing to hear the divorce case in which the state is interested and not only the parties. The case distinguished between the statutory provisions for trying and for bringing a divorce case, but did not involve the question of the power of the court to change venue for none had been exercised.

The provisions for trying suits for penalties and forfeitures, ejectments, divorces, probate, guardian and ward and adoption matters, partitions and issuing writs, etc., seem to refer to the fourth subdivision of Sec. 1647 in that they modify the power therein given to circuit courts to hear any civil cause "except as otherwise expressly provided," the trial of these matters being expressly provided for in Sec. 1648. The power of any circuit court under subdivision five of Sec. 1647 to change the venue in any civil case pending before it is not a limitation upon the power of trying any civil case but merely enables the court in its discretion to transfer cases to another circuit, the words "provided, however, that any circuit court," in this subdivision meaning nothing more than the word "and" or "or." The fourth and fifth subdivisions then might as well read as follows: "Circuit courts have jurisdiction of all civil causes, except those named in Sec. 1648, with power to change the venue of all such causes including those for the trial of which express provision is made." Any other construction would nullify the provision for changes of venue which has always been authorized in cases in which it is shown that a fair and impartial trial cannot otherwise be had. (Sec. 857 C. C., and Sec. 857 C. L.) There is the strongest kind of presumption against legislative intent of

Kalaeokekoi v. Wailuku Sugar Co., 19 Haw. 366.

such result and it ought not to be inferred from the statute if the inference may reasonably be avoided. "It not infrequently occurs that one portion or provision of a statute, if literally or even naturally construed, would practically nullify the whole, or some material portion, of the remainder of the act, with the effect of defeating its obvious purpose." In such cases it is a settled rule of construction that "such an interpretation shall, if possible, be placed upon the statute, *ut magis valeat quam pereat*." Sec. 265 Endlich, Interpretation. Again, "the question whether a proviso in the whole or in part relates to and qualifies, restrains or operates upon the immediately preceding provisions only of the statute, must depend, I think, upon its words and import, and not upon the division into sections that may be made for convenience of reference in the printed copies of the statute." Sec. 186 Ib. It is not a necessary rule that a proviso is always to be construed "with reference to the immediately preceding parts of the clause to which it is attached," but where a proviso "follows and restricts an enacting clause general in its scope and language, it is to be strictly construed and limited to the objects fairly within its terms." Sec. 186 Ib.

If the provisions in Sec. 1648 R. L., localizing the cases therein named, refer to subdivision four in Sec. 1647, giving general jurisdiction, instead of subdivision five, authorizing change of venue, there would be no miscarriage of justice in cases where a fair trial cannot otherwise be had, and such a construction is grammatically correct.

At common law an action of ejectment is local, triable only in the county in which the land is situated, but judges exercised discretionary power to change the venue in such cases. 3 Blackstone 294. The statute, in the fourth subdivision of Sec. 1647, goes further than the common law in giving circuit courts jurisdiction of all civil causes at law unless the local actions named in Sec. 1648 are excepted, but the prohibition of ejectment cases

Kalaeokekoi v. Wailuku Sugar Co., 19 Haw. 366.

in other circuits than where the land lies leaves the statute precisely as the matter stood at common law.

To the suggestion that the statute would then be unnecessary it must be observed that the common law was not declared in Hawaii until 1892, the date of this very statute.

Upon these considerations I think that the circuit court has discretionary power to change the venue in this action of ejectment.

DISSENTING OPINION OF BAILLOU, J.

The construction of the statutes involved in this case appears to me to raise the familiar question as to how far the court should depart from the ordinary and natural meaning of the language used by the legislature in order to avoid a result which it believes to be so mischievous in consequences as to raise a presumption that, in spite of the plain import of the words, it could not have been within the legislative intent.

The exact question is whether R. L. Sec. 1649, providing that the power and jurisdiction of circuit courts shall be limited so that actions of ejectment shall be triable only in the circuit in which the real property is situated is a limitation upon the fifth paragraph of R. L. Sec. 1647 providing for a change of venue upon proof that a fair and impartial trial cannot be had or upon consent of parties, or whether on the contrary the provision for change of venue is a modification or limitation upon the provision that an action of ejectment shall be triable only in the circuit in which the property is situated.

The language of the statute seems to me to be clear. R. L. Sec. 1649 is expressed to be a limitation on the entire power and jurisdiction of circuit courts and circuit judges in chambers in civil cases as defined by Secs. 1647 and 1648 so far as the particular cases are specified. Naturally the proviso concerning actions of ejectment is not a limitation upon the power to try criminal offenses but so far as corresponding provisions are con-

Kalaeokekoī v. Walluku Sugar Co., 19 Haw. 366.

cerned the provisions of Sec. 1649 are expressed to be limitations on all the provisions of the preceding sections, and the introductory language which limits "the power and jurisdiction" is unusually emphatic.

The general and natural rule is that the last proviso modifies all previous provisos and general language, and Sec. 1649 is not only last in order but so far as the provision concerning actions of ejectment is concerned was enacted later than Sec. 1647. Moreover Sec. 1649 is particular in its enumeration of many actions covered by the general language of Secs. 1647 and 1648, and it is a general rule of statutory construction that particular language will be held to modify general language. The application in this case can be best illustrated by throwing the two provisions under consideration into one sentence, which would then read, "Any circuit court may in its discretion upon the consent of all the parties to any civil cause pending in such court, change the venue to some other circuit court and order the record to be transferred thereto, provided, however, that actions of ejectment shall be triable only in the circuit in which the real property is situated." The effect of the particular language upon the general becomes apparent. It will also be observed that some of the paragraphs of Sec. 1649 provide that actions shall be "triable" only in certain circuits while other paragraphs provide that proceedings shall be "brought" only in certain circuits. In the latter class of cases, so far as they include cases which might come before the circuit courts, there would be nothing to prevent a subsequent change of venue in accordance with the earlier provision, but the word "triable" imports a different meaning and its use should be given effect.

By the language itself and by the ordinary rules applicable to statutory construction the limitation on the jurisdiction to try actions of ejectment is a limitation upon the power to change the venue in any case. Although no reason is apparent why the legislature should have so wished to control the action of

Kalaeokeko v. Walluku Sugar Co., 19 Haw. 366.

the court upon the consent of both parties there is no reason on the other hand why it should not do so if it wished. The only real trouble comes in the fact that the same construction would apply in cases where a fair and impartial trial cannot be had. That this would result in a serious defect in the law may be admitted, but the resulting mischief is not sufficiently serious to warrant the court in applying the principle of *Hawaii v. Mankichi*, 190 U. S. 197, and departing from what seems to be the plain import of the language. If Sec. 1649 were limited to its third subdivision and provided merely that divorce cases should be triable only in the circuit where the parties last lived together as man and wife, I think the court would have no hesitation in construing this to be a limitation upon the power to change the venue in any case, such an enactment being reasonable and capable of being supported by sound argument based upon public policy. The same language is used with reference to actions of ejectment, and while no similar reason is apparent the same language should be given the same effect.

The portion of the fifth paragraph of Sec. 1647 which furnishes the strongest argument *ab inconvenienti* is the weakest so far as all rules of statutory construction are concerned, because the power to change venue upon proof that an impartial trial cannot be had is not expressed as a proviso, as is the case with the provision respecting the change of venue upon consent of the parties. Were the latter provision eliminated the only proviso, expressed as such, would be that in the introduction to Sec. 1649 and I do not see how the court could escape the conclusion that it modified the preceding general language. Even as the paragraph stands, the last clause is not in fact a proviso but merely an addition to the first clause and the only real provisos or limitations are those in Sec. 1649. To take the one concerning ejectment from its place and insert it between the fourth and fifth paragraphs of Sec. 1647 would no doubt lead to the conclusion arrived at by the court, but no proviso can

Kalaeokekol v. Wailuku Sugar Co., 19 Haw. 366.

be taken from its place after general language and put before it without doing violence to the language as written.

So far as Hawaiian decisions are concerned the question has never been passed upon by the supreme court. If as now contended it was raised in one sentence of the brief of one of the parties in *Spreckels v. De Bolt*, 16 Haw. 476, it was apparently overlooked in the decision. The proposition that there is no adequate judicial precedent until a point is squarely passed upon seems to have been decided by *Notley v. Brown*, 17 Haw. 393, in which a judge who had been of counsel was held to be not disqualified as against fifty-four previous cases in which such disqualification had been assumed but never decided.

MOSES KAUIHIMAIU v. ANNIE KAUIHIMAIU.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

SUBMITTED MARCH 15, 1909.

DECIDED MARCH 19, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

DIVORCE—*extreme cruelty*.

"It is not extreme cruelty for a wife to join a sect and obey the instructions of its leader who pretended to be inspired that women members of the sect live with him and apart from their husbands, the evidence showing that the husband's health was not impaired thereby."

OPINION OF THE COURT BY HARTWELL, C. J.

The plaintiff obtained a decree of divorce from his wife on the ground of extreme cruelty which consisted in her joining a sect organized by one Ezera who claims to have communications with the spirits of deceased persons and to be able to obtain their curse or blessing upon members of the sect. Pretend-

Kauhimahu v. Kauhimahu, 19 Haw. 378.

ing to be inspired by the spirits he instructed women members of the sect to live apart from their husbands and cohabit with him. The defendant obeyed these instructions on several occasions, and was once arrested for participation in a public exhibition of fanaticism, but each time her offense was condoned and marital relations resumed. Finding, however, that she was disobeying his instructions to have no further communications with members of the sect plaintiff brought a libel for divorce alleging that his home was broken up and ruined and that he thereby suffered extreme mental agony which preyed upon him so as to impair his sleep, appetite, ability to work and his health.

In *Bartlett v. Bartlett*, 13 Haw. 707, 708, the court say: "Mental suffering is not generally deemed sufficient unless it is such as to impair the health, in other words, if mental suffering is sufficient, its test is generally that it impairs the health." The wife's conduct in this case certainly ought to make the husband's home life unbearable but it will not do to grant divorces on the ground that the married pair are unendurable to each other. Causing mental agony is not, under our statute, extreme cruelty. As stated by the court in the *Bartlett* case, "From the very nature of the case no definition of extreme cruelty can be framed which can be satisfactorily or easily applied to all cases."

The plaintiff testified that his wife's conduct worried him so that he did not sleep well and kept him from study and work, but that it did not affect his health. Whether the evidence would sustain a finding of adultery or not we cannot hold that it shows a case of extreme cruelty. *Coleman v. Coleman*, 5 Haw. 260.

Decree reversed, libel dismissed.

J. Lightfoot for plaintiff.

J. M. Viras and *A. G. Correa* for defendant.

Charman v. Charman, 19. Haw. 380.

MARY CHARMAN AND MOSES MILLER v. WILLIAM CHARMAN.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED MARCH 15, 1909.

DECIDED MARCH 22, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

NEW TRIAL—*newly discovered evidence.*

Exception to granting a new trial on the ground of newly discovered evidence is not sustained the evidence appearing to be material.

OPINION OF THE COURT BY HARTWELL, C. J.

This was an action to quiet title in a certain parcel of land at Koloa on the Island of Kauai claimed by the plaintiffs to have been devised to them by George Charman, deceased testate, by his will dated June 27, 1887, and admitted to probate February 18, 1892, devising to the testator's widow Mary Charman, one of the plaintiffs, for her life, besides other property, "the store and land now leased to L. Turner," over in fee to a grandson, Moses Miller, the co-plaintiff. The plaintiffs claimed that the "store and land now leased to L. Turner" consisted of the two adjoining pieces described in their complaint by metes and bounds, which, as the evidence shows, were occupied by him under some arrangement or other with George Charman, while the defendant claims that the land included nothing more than that which had been leased to Apau by the testator by a lease dated June 11, 1885, for the term of fifteen years at a monthly rental of \$12, rent to begin five years after the date of the lease of property described in the lease as "a certain piece of land in the corner of William Charman's land where his store now stand from the wall to the post and railin fence in wide forty feed herein after mentioned," and that the lease is too indefinite in

Charman v. Charman, 19 Haw. 380.

its description of the premises to indicate what the testator meant by "the store and land now leased to L. Turner." The Apau lease, it appears, was assigned to Turner by Apau's assignees in bankruptcy, with the lessor's consent endorsed upon it, May 28, 1886, and no other lease is shown to have been held by Turner.

Jury being waived the case by stipulation was tried by Judge Robinson of the first circuit in place of Judge Hardy of the fifth circuit disqualified.

The plaintiffs showed by the testimony of Louis Kahlbaum that L. Turner's store was on the part of the land belonging to George Charman which is now claimed by the defendant, and by the evidence of F. Turner, a brother of L. Turner, that when he himself went there to live with the brother in 1887 their store was on the corner of the estate land not claimed by the defendant; that his brother had arranged for it with George Charman and that no change was made in their building until he (F. Turner) left in 1891, he having meanwhile bought out his brother who moved away, and that he paid rent for the entire premises to George Charman.

Much evidence was introduced and admitted tending to identify and locate the land covered by the Apau lease, but the judge, apparently regarding this as insufficient to show what the testator meant by the store and land leased to L. Turner, gave judgment for the defendant. The plaintiffs moved for a new trial on the ground of newly discovered evidence, namely, that of L. Turner who would testify, as shown by affidavit, that "when in Koloa occupying the store and premises formerly known as the Apau store he used and occupied the same land, buildings and premises as had been occupied before him by said Apau, and that his rights therein were as purchaser and holder of the former Apau lease, which premises so occupied by him and by Apau before him were bounded by a stone wall on the mauka side dividing the same from William Charman's land; that the

Charman v. Charman, 19 Haw. 380.

store and buildings formerly used and occupied by Apau extended to within eight or ten feet of the stone wall on William Charman's side and that he, said Turner, never added to said buildings except to add a small kitchen on the makai side. Further, that he paid no rent whatever to George Charman for the premises so occupied, George Charman knowing and understanding the same, and that no rent was payable under said lease for the first five years thereof and that he, said Turner, so occupied the whole of said premises by virtue of holding said Apau lease."

An order was made granting a new trial, to which order the defendant excepted and this is the sole exception before us. It is not disputed that the evidence was newly discovered and it appears to be material, not upon the untenable theory that all land occupied by L. Turner, whether under lease or not, would pass by the terms of the will, but because the description in the lease is so uncertain as to require parol evidence to aid in ascertaining the true boundaries, and occupancy and other acts of the parties are material evidence in this connection.

Exception overruled.

L. J. Warren (Smith & Lewis on the brief) for plaintiffs.

J. Lightfoot for defendant.

EMMA F. WARREN v. AKALA NAHEA, EMILY NAHEA, NAWAHIE NAHEA, NAHEA AND MOOHIALOA NAWAHIE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 17, 1909.

DECIDED MARCH 22, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

MORTGAGE—*injunction against foreclosing—statute of limitations.*

A bill to restrain foreclosure of a mortgage on the ground that the mortgage debt had been paid is properly dismissed upon a

Warren v. Nahea, 19 Hāw. 382.

finding sustained by evidence that payments of interest in advance had been made to include a period within ten years.

OPINION OF THE COURT BY HARTWELL, C. J.

This is an appeal from a decree dismissing a bill for an injunction to restrain foreclosure of a power of sale mortgage of certain land, cattle, horses and mules made May 6, 1893, by D. W. Pae and Maleana, his wife, to the defendant Mrs. Nawahie to secure payment of the mortgagor's note of \$1075.25 payable to the mortgagee with interest at six per cent. per annum payable semi-annually as stated in the mortgage. The mortgagor's wife having died he married the petitioner in 1907 and died intestate in that year when the petitioner married one Warren. April 24, 1908, the mortgagor advertised intention to foreclose. The petitioner, claiming dower in the mortgaged property, brought this suit on the ground that the mortgage was paid, making Pae's children co-defendants with the mortgagee. The mortgagee's answer alleged that the petitioner having deserted Pae and lived in adultery was not entitled to dower; denied payment of any part of the mortgage note, and alleged that the mortgagor paid interest on the note up to a period within ten years prior to the notice of foreclosure; that the interest was paid in full for six and one-half years; that thereafter the mortgagor delivered to her the cattle, horses and other property to be sold and that the proceeds of the sale were from time to time applied on account of the mortgage; that the mortgagor afterwards from time to time begged the mortgagee to let him have the proceeds of the sales and owing to family feeling and because the mortgagee did not need the money they were returned to him and payment of interest and principal deferred from time to time; that the principal was never paid and that the interest is over eight years in arrears.

After hearing the evidence the judge dissolved a temporary injunction and dismissed the bill. The plaintiff contends that more than ten years had elapsed since the last payment on the

Warren^e v. Nahea, 19 Haw. 382.

mortgage and that the right to foreclose is barred under *Ililo v. Liliuokalani*, 15 Haw. 507; that the testimony that \$400 was paid for interest in advance is so unsatisfactory that it cannot be relied upon for the purpose of stopping the running of the statute of limitations; that even if \$400 had been paid for interest in advance that would not prevent the running of the statute; that the evidence that the mortgagor had requested further time, if true, would not show a new promise.

The judge found that "two payments had been made by the mortgagor, one for three hundred dollars and one for one hundred dollars, the latter payment being in November, 1897. From the evidence it appears that these payments were made on account of the interest," and "considering such payments to have been made on account of the interest this brings the interest up to 1899, or less than ten years before the commencement of this suit," he held that "the mortgage is therefore not barred by the statute of limitations." This finding is sustained by the evidence which shows that the earlier payment of \$300 was made July 6, 1894, the later, of \$100, November 17, 1897.

The controversy between the parties was confined to the question whether the debtor had, in fact, applied his payment for interest in advance. The declarations of Pae in his lifetime, as testified to by his children, were that all he had paid was on interest and not on principal, and this evidence was sufficient to warrant a finding for the defendant on this issue. There was no discussion of the question whether such payment would interrupt the running of the statute of limitations. The correct rule we think is "the reception of interest in advance, upon a note, is prima facie evidence of a binding contract to forbear and delay the time of payment; and no suit can be commenced against the maker during the period for which the interest has thus been paid." *Crosby v. Wyatt*, 10 N. H. 323. Payment of interest is, of course, evidence that the principal is owing up to the date to which the interest is reckoned.

Warren v. Nahea, 19 Haw. 382.

The defendants in argument abandoned the claim in their answer that the plaintiff was not entitled to dower. At the trial the plaintiff allowed the bill to be dismissed as against Pac's children.

Decree affirmed.

J. Lightfoot for plaintiff.

A. L. Castle (*Castle & Withington* on the brief) for defendants.

MAUKAA SYLVA (w.) v. WAILUKU SUGAR CO.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED MARCH 3, 1909.

DECIDED MARCH 29, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

EJECTMENT—*verdict contrary to law.*

In ejectment a verdict for plaintiff claiming title by inheritance, the evidence showing that the paper title was in defendant, and the jury being instructed that plaintiff could not also claim by adverse possession, is contrary to law and must be set aside.

EJECTMENT—*death of plaintiff.*

Plaintiff in ejectment having died after a verdict in her favor and before defendant's bill of exception was allowed, a motion in this court by plaintiff's heirs to be substituted will be denied. *Kukea v. Keahi*, 10 Haw. 505.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment for several pieces of land in Waikapu, Maui, in which a verdict was rendered for plaintiff who claimed title by inheritance. Evidence was offered at the trial in her behalf tending to support that claim and also a claim by adverse possession. Defendant showed a paper title to the land and also claimed by adverse possession. Defendant brings exceptions.

Sylva (w) v. Walluku Sugar Co., 19 Haw. 385.

After the evidence was all in defendant requested the court to give the jury the following instruction: "I hereby instruct you that the plaintiff in this case, claiming the land in controversy by inheritance, cannot avail herself of any claim to said property by reason of adverse possession thereof." Plaintiff then moved to amend her complaint so as to include a claim by adverse possession. This motion was denied and the instruction in question was given. As under the evidence plaintiff was entitled to recover if at all only by adverse possession, it is clear that the verdict was contrary to law and consequently it will have to be set aside and a new trial ordered. Defendant urges, however, that plaintiff's evidence of adverse possession, which was weak and unsatisfactory, failed to show that it was continuous for the statutory period and that it should have judgment non obstante. If on a new trial the court should allow the plaintiff to amend so as to claim by adverse possession, we cannot say that the evidence then to be given will be the same as now, and so we do not deem it necessary to discuss whether the evidence as it stands justifies a verdict on that theory.

Plaintiff having died after verdict and before the bill of exceptions was allowed, her children suggested that fact in this court and moved that they as her heirs be substituted in her place. Under the practice laid down in *Kukea v. Keahi*, 10 Haw. 505, the motion will be denied.

Exceptions sustained.

Vivas & Correa as amici curiae.

M. F. Prosser, (*Kinney, Marx, Prosser & Anderson* on the brief), for defendant.

Mills v. Cathcart, 19 Haw. 387.

HARRY T. MILLS v. JOHN W. CATHCART; JAMES BICKNELL, AS AUDITOR OF THE CITY AND COUNTY OF HONOLULU, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED MARCH 22, 1909.

DECIDED MARCH 29, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

COURTS—*jurisdiction—effect of defective declaration.*

A garnishee summons should not be quashed for lack of jurisdiction because the declaration omits some of the statutory allegations, there remaining sufficient to set the machinery of the court in motion.

OPINION OF THE COURT BY BALLOU, J.

The plaintiff in an action of assumpsit in the district court of Honolulu obtained judgment by default for \$255.20 against the defendant. The judgment not being satisfied plaintiff sued out a garnishee process, attaching to the summons a declaration averring the action and judgment, its nonpayment with the exception of \$21.74 paid on account, that Bicknell, as auditor of the City and County of Honolulu, was the defendant's agent, factor, trustee, attorney and debtor and had his money, pay orders, accounts and credits concealed in his hands so that they could not be attached or levied upon, and that the defendant is a government beneficiary, to wit, the city and county attorney of the City and County of Honolulu. The summons is on a printed form, and states, over the signature of the district magistrate, that the plaintiff alleges that the defendant as city and county attorney of the City and County of Honolulu, to the best of the plaintiff's knowledge, receives or is entitled to receive a monthly salary of \$200 by warrant drawn by the auditor and that the plaintiff requests the court to insert in the summons a direction to the officer serving the process to leave a true and

Mills v. Cathcart, 19 Haw. 387.

attested copy thereof with the auditor. The writ thereupon commands the officer to leave the same with the auditor. The defendant and the garnishee, appearing specially, moved to quash the process upon the ground that the court was without jurisdiction to issue the garnishee summons, which motion was sustained upon the grounds that the declaration is no part of the summons and that it does not contain the allegations required by R. L. Sec. 2130. The plaintiff appealed to this court on the points of law involved in this decision.

This statement of points of law appealed upon is informal and inferential, but in the absence of objection we will consider the correctness of the magistrate's ruling upon the grounds specified.

Upon the first ground, the statement that the court was without jurisdiction because the declaration was no part of the summons is unintelligible. Possibly it is a mistake for "the summons is no part of the declaration," it being the plaintiff's position that certain of the statutory allegations which were not in the declaration appear in the summons.

The main point in controversy is whether the court is without jurisdiction because the declaration did not contain certain of the allegations specified in the statute, which provides "the creditor of such beneficiary may bring his suit against his debtor and in his petition or declaration allege to the best of his knowledge" certain enumerated facts. R. L. Sec. 2130. The argument was devoted mainly to the question whether or not all the allegations were in fact in the declaration, but we think the declaration sufficient to invoke the jurisdiction of the court and that the absence of some of the statutory allegations did not go to the jurisdiction so as to warrant quashing the summons but should have been taken advantage of by demurrer.

"There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in

Mills v. Cathcart, 19 Haw. 387.

law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself. * * * The failure to allege any matter necessary to make a cause of action, or the allegation of matters which do not do so, when the object of the pleader is apparent and the relief sought is within the power of the court to grant, can never make the judgment void.” Vanfleet’s Collateral Attack, Sec. 61.

We may remark in passing that the printed form of garnishee summons in use in the district court is not intended to dispense with the necessity of having all necessary allegations appear in the declaration and that it would be better practice to have such allegations over the signature of the plaintiff instead of appearing solely over the signature of the magistrate.

Judgment reversed, case remanded.

A. S. Humphreys for plaintiff.

F. W. Milverton for defendant and garnishee.

M. F. SCOTT, v. JOE MARIA ALIAS JOE MARIA PEDRO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 22, 1909.

DECIDED APRIL 5, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

BILLS AND NOTES—*presentment of dishonored draft by subsequent holder.*

One who indorses a sight draft with notice of its dishonor is liable to a subsequent holder without a second presentment to the drawees.

Scott v. Maria, 19 Haw. 389.

OPINION OF THE COURT BY WILDER, J.

This was an action instituted in the district court of Honolulu on December 24, 1907, to recover \$30 and interest from December 26, 1901. The complaint contained two counts, the first one being upon the defendant's indorsement of the following draft:

Kona Sugar Company.

Payable in silver coin

On Tuesdays and Fridays.

\$30.00 Kailua, Hawaii, 30th September, 1901.

At sight pay to the order of Frank Olivera Thirty 00-100 Dollars, value received and charge the same to the account of Kona Sugar Company, Ltd.

To Messrs. M. W. McChesney & Sons, Agents,
Honolulu, H. T.

No. B 1783 JAS. COWAN, Manager.

(Indorsed) FRANK OLIVEIRA
JOE MARIA.

It is alleged that the draft was presented for payment and dishonored prior to its indorsement by defendant, that at the time of its delivery to plaintiff the drawer, Kona Sugar Co., was insolvent, that since then all of its assets had been sold by a receiver and nothing was ever realized for creditors, and that defendant had knowledge of all of said facts. The second count was upon an account stated. After judgment for defendant in the district court plaintiff appealed to the circuit court jury waived, which sustained defendant's demurrer to the first count on the ground that it failed to allege a presentment of the draft by the plaintiff to the drawees, that payment had been again refused and that notice of dishonor had been given to defendant. Plaintiff was given leave to amend but declined. The case was then tried on the second count resulting in a judgment for plaintiff, the court afterwards granting a new trial. At the conclusion of the new trial plaintiff asked leave to amend his complaint by reinserting the first count with an additional aver-

Scott v. Maria, 19 Haw. 389.

ment that he had made diligent effort to collect the amount from the receiver of Kona Sugar Co., and by adding a third count to the effect that the \$30 with interest was a balance due for building material and labor on a house on defendant's land constructed with defendant's knowledge and approval and appropriated by him for his own use, being a balance of a total cost of \$357.63 which was a fair and reasonable value for the house. The motion to amend was refused and the court gave judgment for defendant and denied a motion for a new trial. Plaintiff excepted to the sustaining of the demurrer to the first count, to the order granting the defendant a new trial, to the refusal to allow the amendment, and to the denial of his motion for a new trial.

The main question in the case is whether the demurrer should have been sustained as to the first count. It is well settled that in order to hold an indorser liable the complaint against him "should contain either an averment of the performance of the conditions fixing his liability, to wit, demand upon the maker and his nonpayment, and notice of dishonor to the indorser, or the excuse for the nonperformance of these conditions." *Hoffschlaeger v. Han Same*, 4 Haw. 419. This general rule, however, is stated with reference to indorsers in due course and not with reference to indorsers with notice after dishonor. Here was a sight draft drawn by the Kona Sugar Co., the drawer, on McChesney & Sons, the drawees, in favor of Olivera, the payee. The declaration alleges that it was presented for payment, but from the absence of any acceptance it is probable that it was dishonored by nonacceptance rather than by nonpayment. At all events it was dishonored paper and known to be such by all parties afterwards concerned. With full knowledge of those facts it came into the hands of defendant. He then could have brought an action against the drawer for the payment of the draft without making a second presentment to the drawees. By his indorsement of this dishonored paper

Scott v. Maria, 19 Haw. 389.

he transferred that right to the plaintiff who certainly was not required any more than defendant to make a second presentment to the drawees before bringing an action against the drawer. At the time of defendant's indorsement everything possible had been done to fix the liability of all antecedent parties. Defendant could not have relied on the acceptance or payment of the draft by the drawees upon a second presentment as he knew they had already refused to accept or pay at all, and he could not by transferring the paper, then dishonored, impose on his transferee anything more than he was required to do, which did not include a second presentment to the drawees.

The only reason for requiring presentment and notice of dishonor to an indorser, which is to enable him promptly to take measures to secure himself by proceedings against the persons liable, did not exist in this case, as he already had such an opportunity.

The rights of the parties having become fixed before the passage of the Negotiable Instruments Act in 1907, must be determined by common law. We have been unable to find any case, and none has been called to our attention, holding that after dishonor a second presentment to a drawee is necessary in order to hold liable one who indorsed thereafter with knowledge. It has been held, however, that it is unnecessary to make a second demand for payment on the maker of a promissory note indorsed with notice of dishonor and give notice of nonpayment to the indorsers, as the original demand and notice inures to the benefit of all subsequent holders. *French v. Jarvis*, 29 Conn. 347. All the more then should it be held that a second presentment to drawees is unnecessary. We are forced to conclude, therefore, that the demurrer to the first count should have been overruled.

The defendant contends that the evidence in the case shows that the first count could not have been sustained, but we can-

Scott v. Marla, 19 Haw. 389.

not pass upon the effect of evidence admitted under different pleadings nor assume that the evidence would have been the same if the first count had remained.

Plaintiff's exception to the denial of his motion for a new trial on the second count was not relied upon and in any event it has no merit.

The exception to sustaining the demurrer to the first count is sustained.

Plaintiff in person.

C. F. Peterson for defendant.

IN THE MATTER OF THE ESTATE OF ABIGAIL K.
CAMPBELL PARKER, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 30, 1909.

DECIDED APRIL 5, 1909.

HARTWELL, C.J., WILDER, J., AND CIRCUIT JUDGE LINDSAY
IN PLACE OF BALLOU, J.

EXECUTORS AND ADMINISTRATORS—*appointment of executor.*

A will appointing two daughters, M. and M. B., "to be the sole executrices of this my will," and directing that if the testatrix should die before M. "and" M. B. shall be of full age the H. T. Co. should "act as such executor and trustee until they the said Muriel Campbell and Mary Beatrice Campbell shall reach their majority and are qualified to act as such executrices and trustees" (the company and the daughters having been appointed trustees under the will), the elder daughter coming of age after the death of the testatrix and before the will is probated is entitled to letters testamentary with the H. T. Co. This construction presents less difficulty than any other, "their" majority being construed as meaning "as they respectively reach the age of majority," and "and" to mean "or."

Estate of Parker, 19 Haw. 393.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal from an order granting letters testamentary to the Hawaiian Trust Company upon the will of Mrs. Abigail Campbell Parker and denying the appellant's petition for her appointment as executrix of the will. The decedent died October 31, 1908, her will being dated October 10. The Trust Co. filed its petition November 15 for the probate of the will and for letters testamentary alleging in its petition that the appellant was then of the age of seventeen years, eleven months and two weeks and that her sister Mary Beatrice was fifteen years of age. The appellant's petition, which was denied, was filed January 28, 1909. The will was admitted to probate and letters testamentary issued to the Trust Co. February 2.

The will of the testatrix devises and bequeaths the residue of her estate to the Hawaiian Trust Company and her daughters Muriel and Beatrice, as Mary Beatrice appears to be called, giving these trustees power to sell and lease real estate, investing the proceeds, and to change and vary investments of securities, with the power of appointment by a judge of the first circuit of new trustees "to succeed the said trustees herein appointed."

In the clauses in the will under which the question herein presented arises, which immediately precede the testimonium clause, the testatrix appoints her daughters Muriel and Beatrice "to be the sole executrices of this my will," directing that "should I depart this life before two of the executrices and trustees named in this Will, to wit, Muriel Campbell and Mary Beatrice Campbell shall be of full age and competent to act, the Hawaiian Trust Company, Limited, one of the trustees shall act as such executor and trustee until they the said Muriel Campbell and Mary Beatrice Campbell shall reach their majority and are qualified to act as such executrices and trustees."

Estate of Parker, 19 Haw. 393.

By one construction of this language neither of the two daughters, although of full age, can be an executrix or a trustee unless the other also is of age. By taking this to be the meaning of the will the death of the younger sister before coming of age would preclude the elder, who is now of age, from ever becoming an executrix inasmuch as the Trust Co. is required to act as executor until both daughters, Muriel "and" Beatrice, reach "their" majority, an event which then could never occur. As two persons of different ages cannot at the same time reach the age of legal majority there is no such thing as "their" majority occurring as a single event. The term is used here in a joint and several sense and in order to indicate the real meaning the word "respectively" may be considered as implied before the word "reach." This requires that either the functions of the Trust Co. as executor terminate upon Muriel's arrival at the age of legal majority or else that the will be taken to mean that the company shall act as sole executor until Muriel becomes of age and then as coexecutor with her only until Beatrice is of age.

Referring to the provision made for appointment of new trustees, although it is obvious that in order to keep the number of three trustees a new trustee would have to be appointed each time a vacancy occurs in that office, the will provides for appointment of a new trustee "in case of the inability or for other good reason or cause the Hawaiian Trust Company, Limited, cannot longer act as trustee under this Will," meaning in case of its inability to act, "and (instead of "or") in case of the death of the said Muriel Campbell *and* Mary Beatrice Campbell." This illustrates the inexactness of language which appears in the clauses under discussion. It would seem to have been easy enough to say that in case of the death of the testatrix, while either or both of the daughters should be under age, the Trust Co. should act as executor until at least one of them should be of age, if such was the intention of the testatrix, or to add, if

Estate of Parker, 19 Haw. 393.

such was the intention, that the Trust Co. should remain executor together with the daughter becoming of age until the other also, if she should so long live, became of age, but it also seems likely that if it was the intention of the testatrix that the company was to act as sole executor until both daughters became of age, one after the other, she would have stopped with the words "act as such executor" and not gone on to provide for the termination of the company's authority to act by using language different from that which authorized it to begin to act as executor.

As the will reads the only circumstance under which the Trust Co. is directed to "act as such executor and trustee" is upon the death of the testatrix before either of the daughters shall be of age, and once beginning to be executor and trustee it would continue to act as such indefinitely if either or both of the daughters should not live to become of age, the will giving no authority for coexecutors except in the case of the two daughters. That is to say, in this view the Trust Co. was required by the will to act as executor in the event which occurred of the testatrix dying before both daughters had become of age and to continue so to act until both come of age unless the expression concerning them, "shall reach their majority," can be taken to mean "shall respectively reach their majority," with a further implication of an intention that during the minority of Beatrice the estate shall be administered by the Trust Co. and the other daughter as coexecutors. There is ample authority for using the word "their" in the sense of "each of them," as, for instance, in *Sargent v. Bourne*, 6 Met. 32. So of a direction to an executor to procure a residence for a daughter and hold it in trust for her "and" her son during "their" lives, and upon the decease of both a devise over, the daughter and son having an interest during their joint lives and the life of the survivor. *Dow v. Doyle*, 103 Mass. 491. An instruction that the defendant has the burden to show the

Estate of Parker, 19 Haw. 393.

defense that the plaintiff's injury resulted from his intoxication "and" negligence means "or." *Loewer v. Sedalia*, 77 Mo. 431, 447. Property in which A "and" B died seized and possessed means A "or" B. *Litchfield v. Cudworth*, 15 Pick. 23, 27. The right of re-entry for nonpayment of certain debts "and" causing expense to the grantor is a case of an alternative. *Jackson v. Topping*, 1 Wend. 389. In the construction of a written contract "claims due said A 'and' B," were held to be due to A "or" B. *Snow v. Pressey*, 85 Me. 408. An agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife and during the life of the survivor. *Douglas v. Parsons*, 22 Oh. St. 526. A testator devised his farm to his two sons in the following words: "I give and bequeath to my two sons, John and Edward, all my farm after my death, to them as long as they do live, and after their death to their children." Held "that John and Edward take a life estate with remainder to their children as purchasers upon the death of the survivor." *Jones v. Cable*, 114 Pa. 586. The words "during their joint and natural lives" in a settlement mean "during their joint lives and the life of each of them." *Smith v. Oakes*, 14 Sim. 122, 124; 60 Eng. Rep. 304. In construction of statutes as well as deeds, as held in *Chapin v. Tisdale*, 5 Haw. 52, "each of the terms 'or' and 'and' has the meaning of the other or both, when the subject matter, sense and connection require such construction." R. L. Sec. 15.

On the whole, in view of the inapt or inartistic language in portions of the will the difficulties appear to be less in accepting the construction contended for by the appellant than that submitted by the Trust Co. although in its petition for probate it prayed that letters issue to Muriel as well as to itself.

Order reversed, case remanded with direction to issue letters testamentary to the Hawaiian Trust Company, Limited, and the appellant, as coexecutors, according to the tenor of the will.

Estate of Parker, 19 Haw. 393.

G. A. Davis and C. F. Clemons (Thompson & Clemons also on the brief) for appellant.

R. B. Anderson (Kinney, Marx, Prosser and Anderson on the brief) for appellee.

WILLIAM W. BIERCE, LIMITED, v. WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 8, 9, 1909.

DECIDED APRIL 12, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

PRINCIPAL AND SURETY—*discharge of surety by variation of risk.*

The plaintiff in a replevin action having alleged in its declaration and replevin bond the actual value of the property replevied to be \$15,000, and the defendant in that action having given a return bond in double the amount reciting the valuation as alleged, subsequent amendments whereby the plaintiff increased the valuation to \$22,000 and recovered alternative judgment for that amount are a variation of the risk of the sureties on the return bond and discharge them from liability.

OPINION OF THE COURT BY BALLOU, J.

(Wilder, J., dissenting.)

This is a bill of exceptions to review a judgment against the defendants, as executors of the will of Henry Waterhouse, upon a return bond in a replevin action executed by Henry Waterhouse as surety.

The replevin action was brought by the plaintiff against Clinton J. Hutchins, trustee, on July 20, 1903, and was for the recovery of certain railway material which had been used by

Bierce v. Waterhouse, 19 Haw. 398.

the Kona Sugar Co., Ltd., the property of which corporation had been bought by Hutchins at a receiver's sale. Plaintiff alleged in its declaration that the actual value of the property was \$15,000 and filed its affidavit in conformity with R. L. Sec. 2102, then Civil Laws, Sec. 1695, alleging, in conformity with the statutory requirement of "the actual value of the property" that the actual value of the property was \$15,000 and tendered its bond in double that amount. Hutchins thereupon elected to retain possession of the property under R. L. Sec. 2112 by giving the return bond upon which the present action is founded which reads as follows:

CIRCUIT COURT, THIRD CIRCUIT.

TERRITORY OF HAWAII.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff.	}	Replevin.
v.		
CLINTON J. HUTCHINS, TRUSTEE. (\$1.00 stamp)		

RETURN BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bond unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of \$15,000

Bierce v. Waterhouse, 19 Haw. 398.

as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In Witness Whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

Clinton J. Hutchins,
Trustee.

Henry Waterhouse,
Surety.

Arthur B. Wood,
Surety.

The foregoing bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

A. M. Brown, High Sheriff.

(Endorsed:) Filed, August 1st, 1903, 7 o'clock A. M. J. P. Curts, Clerk.

Before going to trial plaintiff amended his declaration by increasing the allegation of the actual value of the property from \$15,000 to \$20,000, which amendment was allowed by the court March 7, 1904, and at the close of his case by again increasing the value to \$22,000, which amendment was allowed March 19, 1904. The case was tried jury waived, and plaintiff recovered judgment for the return of the property with \$1045 damages and \$50.50 costs, with an alternative judgment in case of failure to return for \$22,000, the adjudged value of the property, with the same damages and costs. Certain exceptions brought by the defendant Hutchins were sustained by this court, the decision being rendered January 28, 1905. *Bierce v. Hutchins*, 16 Haw. 418. At that time this was the court of final ap-

Bierce v. Waterhouse, 19 Haw. 398.

peal in the case, no federal question being involved. On March 3, 1905, an act of congress was passed allowing appeals from this court in cases involving over \$5000. (33 Stat. 1035, c. 1465, sec. 3.) After a petition for rehearing decided April 29, 1905 (*Bierce v. Hutchins*, 16 Haw. 717), the plaintiff stated that it would have no further evidence to present if the case were remanded and asked that a judgment remanding with directions to enter judgment for the defendants, be entered in this court which, in the absence of objection from the defendant in that action, was done. An appeal from this judgment was allowed by the Supreme Court of the United States and the judgment reversed. *Bierce v. Hutchins*, 205 U. S. 340. This court then held that the defendant in that action was entitled to a hearing upon exceptions not passed upon at the first hearing (*Bierce v. Hutchins*, 18 Haw. 374) but after hearing overruled the exceptions. (*Bierce v. Hutchins*, 18 Haw. 511.) An appeal from this decision was dismissed (*Hutchins v. Bierce*, 211 U. S. 429, December 14, 1908).

Meanwhile Henry Waterhouse had died February 20, 1904, and the present defendants qualified as his executors. After the trial of the replevin action the plaintiff caused execution to be issued April 15, 1904, notwithstanding the pendency of the defendant's exceptions. The statute allowing this procedure upon good cause shown (R. L. Sec. 1861) had been passed April 22, 1903, before the execution of the bond now sued upon, but went into effect August 1, 1903, the day the bond was filed and a few days after its execution. The execution having been returned unsatisfied, the present action, joining Hutchins, Wood and the executors of Henry Waterhouse as defendants, was filed on October 11, 1904, at which time the exceptions in the replevin action were pending in the Supreme Court of the Territory. A demurrer was overruled and the defendants answered. Before the case was brought to trial the Supreme Court of the Territory sustained the exceptions in the replevin action where-

Bierce v. Waterhouse, 19 Haw. 398.

upon the defendants in the action on the bond pressed for trial, but continuances were granted by the court until after the first decision of the Supreme Court of the United States and the subsequent overruling of the remaining exceptions by this court. Upon a suggestion of misjoinder plaintiff discontinued as to Hutchins and Wood and proceeded solely against the Waterhouse executors. The case was tried before a jury in May, 1908, the principal issue of fact being whether or not there had been an actual redelivery of the property in April or May, 1904, after the judgment of the circuit court. The jury found for the plaintiff for the sum of \$22,000 with interest at six per cent. from April 15, 1904, also for the sum of \$748.57 with interest at eight per cent. from September 27, 1907, the aggregate of principal and interest being \$28,156.74. The smaller item was composed of costs in the United States Supreme Court and of costs in the Supreme Court of the Territory, the damages in the replevin action having been paid.

The bill of exceptions brings up 127 exceptions, most of which were argued and relied upon. Many of these, however, relate to the same points, the principal defenses of the sureties being that they were discharged by the amendment to the local statute allowing execution to issue in certain cases pending exceptions; that they were discharged by the amendment to the Organic Act allowing an appeal to the Supreme Court of the United States in cases involving over \$5000; that they were discharged by plaintiff's successive amendments to its declaration whereby the alleged value of the property was increased from \$15,000 to \$22,000; that the suit was prematurely brought against these executors; and that the law laid down by the trial court as the obligor's duty to return the property after judgment was inapplicable and misleading in view of certain correspondence in which Hutchins purported to deliver the property with certain conditions, which delivery was accepted by the plaintiff upon other conditions.

Bierce v. Waterhouse, 19 Haw. 398.

We find it necessary to consider only those exceptions which go to the amendments of value made by the plaintiff. This defense of the sureties is based upon the fact that the plaintiff in its replevin affidavit swore that the actual value of the property was \$15,000, which fact is recited in the condition of the redelivery bond, the plaintiff's declaration containing the same allegation. After the execution of the bond the plaintiff amended the allegation in his declaration first to \$20,000 and afterwards to \$22,000. The prayer of the declaration was for judgment for the return of the property, with damages for detention and costs, but according to the practice in replevin, by which an alternative cash judgment for the value of the property was rendered in default of the return of the property, the amendments amounted to an increase of the *ad damnum*, and the sureties claim that this is an alteration of their contract, and an increase in the risk assumed by which they are discharged from liability.

The question thus raised is one of considerable difficulty, and one on which the decisions are conflicting. The contract of the surety may be with reference to another contract, usually called the principal contract, between the principal and a third party, as a bond to secure the performance of a building contract; or on the other hand it may be with reference merely to an undertaking of the principal, as a bond that he will appear in court or that he will pay a judgment which may be rendered against him. The rule that any "alteration in the contract" releases the surety is frequently stated, but it is not always clear whether the contract referred to is the principal contract or the bond of the surety, or whether in the case of a surety for an undertaking the word contract is not used to mean either existing circumstances or the terms upon which performance may be demanded. In the case of a surety upon a contract any alteration in the principal contract releases the surety, the commonest case being an agreement between the principal and the third party modifying the terms of the principal contract. *United States v. Freel*,

Bierce v. Waterhouse, 19 Haw. 398.

186 U. S. 309. Another kind of "alteration of contract" is an alteration made on the face of the bond itself (*Martin v. Thomas*, 24 How. 315; *Smith v. United States*, 2 Wall. 219) or upon the face of an instrument referred to in the bond. *Miller v. Stewart*, 9 Wheat. 680. In the latter case, the instrument appointing a deputy collector was altered by the addition of a ninth township to the eight specified. The court lays some stress upon the alteration being on the face of the instrument, but the case has been widely cited and applied where there was no such technical alteration, but where a modification of the duties of the principal or of the terms of the undertaking guaranteed by the sureties has been held to be an alteration of the contract. Thus in *Reese v. United States*, 9 Wall. 13, the bond was for the appearance of a defendant at a designated term of court in San Francisco "and at any subsequent term to be thereafter held in that city." A stipulation between the district attorney and defendant's counsel, approved by the court, that the case should be brought to trial only after final decrees in certain civil actions and provided they were against defendant was held to discharge the sureties, the court saying:

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even

Bierce v. Waterhouse, 19 Haw. 398.

that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Here there was no alteration in the sureties' contract, and there was no contract, in the ordinary sense of that word, between the defendant and the district attorney which was subsequently altered. There was a modification, by proper authority, of the terms of the principal's undertaking to appear, which was held to be an entire discharge of the contract of the sureties. We dwell on this distinction because the use of the word contract in this connection appears to be the source of some confusion. In *United States v. Backland*, 33 Fed. 156, for example, the "contract" held to be changed had been fulfilled. A more accurate statement of the effect of the decisions of the Supreme Court is as follows:

"They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract." 2 Parsons Contracts *17.

Upon the precise question of the effect of an increase of the ad damnum upon a bond previously executed there is a conflict of authority. The majority of the cases hold the sureties are not discharged. Thus in *New Haven Bank v. Miles*, 5 Conn. 587, where the defendant had been arrested in a civil action and the bail bond was conditioned only for his appearance in court, an increase from \$600 to \$1200 was held not to discharge the sureties, the court holding that they assumed the risk of all amendments allowed by statute. In *Carr & Hobson v. Sterling*, 114 N. Y. 558, another case of arrest on civil process, the undertaking provided that the defendant "shall at all times render himself amenable to any mandate which may be issued to enforce final judgment against him in the action." The ad dam-

Bierce v. Waterhouse, 19 Haw. 398.

num was increased from \$7000 to over \$13,000 and after judgment by default the sheriff returned "defendant not found." The surety was held liable, but there is no distinction taken between the rights of the surety and those of the principal. In these two cases there was no undertaking in the bond to pay the amount of the judgment recovered.

In *Hare v. Marsh*, 61 Wis. 435, an amendment of the ad damnum in the justice's court on an action of tort to an amount in the circuit court beyond the justice's jurisdiction was held not to release the surety on the bond given to stay execution pending the appeal, the undertaking of the bond being to pay any judgment remaining unsatisfied. The court says: "The undertaking presupposes the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not expressly, with reference to such exercise of judicial power." Exactly the opposite result was reached in *Erers v. Sager*, 28 Mich. 47, although there is a dictum to the effect that the sureties would have been bound had the amendment been within the power of the court irrespective of stipulation. In Massachusetts a statute (Pub. Sts. c. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed. If the sureties are notified of the proposed amendment they are bound by its allowance, subject to exception or appeal, if not notified they are still liable if it appears that the adjudication was correct, and the court may go outside the record and receive oral testimony as to what was the cause of action intended to be relied on when the suit was commenced. *Driscoll v. Holt*, 170 Mass. 262. The issue under this statute is therefore merely whether a new cause of action has been introduced, and decisions upon one side or the other (*Prince v. Clark*, 127 Mass. 599; *Townsend Bank v. Jones*, 151 Mass. 454) are not helpful. In Maine an increase

Bierce v. Waterhouse, 19 Haw. 398.

of the ad damnum upon the same demand discharges the sureties upon a bond given with reference to the action (*Langley v. Adams*, 40 Me. 125), and the same principle was applied where the creditor, without amendment, took judgment in excess of his ad damnum. *Ruggles v. Berry*, 76 Me. 262.

The only principle that can be deduced from the cases holding the sureties liable is that sureties on judicial bonds, as distinguished from sureties on private contracts or undertakings, contract with knowledge of the power of the court, under statute or otherwise, to make amendments, and must be presumed to take the risk of such amendments even if their liability is thereby increased. If this principle is sound it would be of much wider application than cases of the increase of ad damnum, yet outside that field it is seldom recognized and the distinction generally denied. Brandt, Suretyship, Sec. 511; *Reese v. United States*, quoted above. One of the most common amendments under statutes is the substitution of new parties, and yet this is generally held to discharge the sureties. *Richards v. Storer*, 114 Mass. 101; *Tucker v. White*, 5 Allen 322. Contra, *Jamieson v. Capron*, 95 Pa. St. 15. The correction of an error in the description of the property replevied as the substitution of "north-east" for "south-east" in the quarter section from which logs were cut is well within the power of amendment, but discharges the sureties. *Bolton v. Nitz*, 88 Mich. 354. The surety on a judgment for alimony or on a temporary injunction knows that it may be modified by the court, yet he is discharged by such modification. *Sage v. Strong*, 40 Wis. 575; *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15. Sometimes, of course, the language of the bond, by fair construction, shows that subsequent increase of risk has been assumed as where the condition that a distiller "shall in all respects faithfully comply with all the provisions of law," etc., has been held to signify an intention to stipulate that the principal should comply with duties subsequently imposed by law. *United States v. Powell*, 14 Wall. 493.

Bierce v. Waterhouse, 19 Haw. 398.

The rule of strictissimi juris has been said to be a stringent one, and liable at times to work a practical injustice. With regard to subsequent amendments in judicial proceedings we should hesitate to apply it except when it resulted in a variation of risk which was plainly outside the contract of the sureties. Even an increase of the ad damnum might not have that effect, as when the cause of action is certain drafts with interest thereon, and the ad damnum is increased to cover interest subsequently accruing. *Townsend Bank v. Jones*, 151 Mass. 454. Here the surety was fairly apprised of his risk at the outset and the amendment was to satisfy legal formality. The case at bar is quite different. It is impossible to read the bond without inferring that the value therein recited, fixed by the plaintiff itself, was part of the material inducement upon which the sureties assumed the risk. The responsibility for "such sum as may for any cause be recovered against the defendant" evidently refers to recovery upon the action recited. *The Oregon*, 158 U. S. 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, \$30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L. Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for \$22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged.

The exception to the overruling of defendants' motion for judgment non obstante veredicto, in so far as it is based upon

Blerce v. Waterhouse, 19 Haw. 398.

their discharge from liability by the plaintiff's amendments of value, is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon.

A. G. M. Robertson for plaintiff.

A. Lewis, Jr., D. L. Withington and *John W. Cathcart* (*Smith & Lewis, Castle & Withington* on the briefs) for defendants.

DISSENTING OPINION OF WILDER, J.

The surety in this case agreed to pay "such sum as may, for any cause, be recovered against" Hutchins. The limit of that obligation was stated in the bond to be \$30,000. Plaintiff having recovered against Hutchins the sum of \$22,000, the surety is bound by his obligation to pay that sum. The conclusion of the majority of the court that the surety is discharged is based on the assumption that the surety's risk was increased by the amendments in the replevin action raising the value of the property from \$15,000 to \$22,000. That assumption very properly requires that the risk or obligation of the surety should be stated differently from what it is in the bond under the statute. If the obligation of the surety was as stated by the majority, then the conclusion they reach logically follows. If, on the other hand, it was as stated in the bond and in the statute, that conclusion does not and cannot logically follow. To be sure the obligation and the limit of that obligation are different things. The obligation is to pay such sum as may be recovered, while the limit provides that in no event can that sum, so far as the surety is concerned, be more than \$30,000.

From the cases referred to by the majority it appears that the courts in Massachusetts, Connecticut, New York, Wisconsin, Pennsylvania and, possibly Michigan, to which should be added Ohio, Indiana and Vermont, (*Jaynes v. Platt*, 47 Oh. St. 262; *Sherry v. Bank*, 6 Ind. 397; *Wright v. Brownell*, 3 Vt. 436,) would hold that in this case the surety was not discharged, while in Maine it would be held the other way. The two cases

Bierce v. Waterhouse, 19 Haw. 398.

of *Sage v. Strong*, 40 Wis. 575, and *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15, are easily distinguishable from the case at bar. In the first one the surety obligated himself to see that a judgment which had already been rendered would be paid, while in the second case the obligation of the surety was to pay any damages caused by an injunction which had already issued. The surety in each case knew when he signed the bond that the judgment or injunction could be modified by the court, but he never agreed to be bound by a modification any more than he agreed to be bound in case a different judgment or injunction was thereafter entered. That is something entirely different from the case where a surety knows when he executes the bond that he is to be liable if at all to pay a judgment to be rendered in the future and, it must be remembered, in the usual course of procedure, which would include amendments of the kind made.

The majority opinion being in my opinion contrary to both principle and the great weight of the decided cases, I am compelled to dissent therefrom.

H. G. MIDDLEDITCH, AS TRUSTEE IN BANKRUPTCY
OF CHAS. F. HERRICK CARRIAGE COMPANY,
LIMITED, v. JOHN W. CATHCART, MARY CATH-
CART, WIFE OF SAID JOHN W. CATHCART, AND
EDITH E. POND.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 5, 1909.

DECIDED APRIL 15, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

CREDITOR'S BILL—*contract for purchase of real estate in wife's name.*

A contract for purchase of real estate in the name of the wife

Middleditch v. Cathcart, 19 Haw. 410.

obtained by her husband followed by his part payment on account of the contract is not per se in fraud of subsequent creditors.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal allowed from an order overruling the defendants' demurrer to an amended creditor's bill brought by plaintiff containing in substance the following averments: That on September 4, 1902, the defendant John W. Cathcart was indebted to the Herrick Carriage Company \$202 evidenced by his promissory notes of that date, three of them for \$50 each payable to the order of the said company in two, four and six months respectively and one note for \$52 payable in eight months with interest at eight per cent. per annum; that May 20, 1903, the company was adjudged bankrupt and that on September 29, 1904, the plaintiff was appointed as its sole trustee in bankruptcy; that about December 20, 1905, the plaintiff recovered judgment against said Cathcart for \$275.23 in the first circuit court of the Territory; that about July 14, 1908, no execution having been issued on the judgment, it was revived by scire facias by a judge of the first circuit court at chambers and an execution thereon issued July 14, 1908, for \$337.65, the sum then due the plaintiff as trustee aforesaid, and was returned about August 6, 1908, nulla bona; that no part of the judgment has been paid and that there is now owing the plaintiff as trustee aforesaid on account thereof and for costs of the execution \$337.65; that about the — day of August, 1902, as plaintiff is informed and believes and charges the fact to be, the defendant Mary Cathcart, then and now wife of said John W. Cathcart, entered into a certain contract with the defendant Edith E. Pond whereby she agreed to purchase, and the said Edith E. Pond to sell to her, for \$1500 that certain lot of land with a dwelling-house thereon in Honolulu described in the bill as lot 4 in block 8 of the College Hills tract, being the premises occupied by the said John W. Cathcart as a family

Middleditch v. Cathcart, 19 Haw. 410.

residence by warranty deed but subject to a mortgage for \$2000 held on said premises by Peter C. Jones, Ltd.; that this contract "was a plan conceived and devised by the said John W. Cathcart to hinder, delay and defraud his creditors of their just debts, and more particularly your Orator, as trustee aforesaid;" that while the contract was made in the name of Mary Cathcart the negotiations which led up to it were conducted by said John W. Cathcart, Mary Cathcart taking no part therein other than signing her name to the same; that the precise nature and terms of the contract are not known to the plaintiff, but upon information and belief he alleges that said Mary Cathcart has paid to said Edith E. Pond on account thereof the sum of \$2055 and that her equity therein is coextensive with the payment so made by her in the proportion which such payments bear to the price for which said Edith E. Pond agreed in said contract to sell the same; that the said Mary Cathcart at the time said contract was made had no property or means whatsoever and was without expectation of acquiring any except as she might expect to acquire the same through the said John W. Cathcart and that she has not since come into possession of any property or means save by gifts from said John W. Cathcart; that all payments made to the said Edith E. Pond on account of said contract were made by said John W. Cathcart with his own money, he taking the receipt therefor in the name of said Mary Cathcart, as a part of a scheme and plan to hinder, delay and defraud his creditors and more particularly the plaintiff as trustee aforesaid; that by reason of said fraudulent practices she holds her equity in said contract with the said Edith E. Pond and in such lot of land as trustee in invitum for the creditors of the said John W. Cathcart and more particularly for the plaintiff as trustee aforesaid.

Interrogatories are filed with the bill, the relief sought being "that the said Mary Cathcart be decreed to hold her equity and right in and to said contract and the lot of land therein men-

Middleditch v. Cathcart, 19 Haw. 410.

tioned, as a trustee in invitum, for" the plaintiff and all other creditors of the said John W. Cathcart similarly situated who may join in this proceeding, contributing to the expense thereof; that said land be condemned and sold under directions of the court, the plaintiff agreeing to indemnify the said Edith E. Pond in the premises, and that out of the proceeds of the sale be paid such sum as may be found due her on the contract, and that the plaintiff and such other creditors as properly join in the proceeding be paid their respective claims, the overplus, if any, being paid to the said Mary Cathcart.

The demurrer was sustained "on the sole grounds that it does not appear from the amended bill of complaint, in what court the complainant recovered a judgment against the defendant John W. Cathcart, nor by what court, or judge, the said judgment was revived by *scire facias*," the court overruling every other ground of demurrer but allowing the plaintiff to amend, and upon the amendment being made the demurrer apparently was regarded as overruled.

The substance of the demurrer was laches in bringing the suit and that it does not appear that Mary Cathcart holds any property subject to execution on a judgment against her husband, the argument being that merely an option to purchase for \$1500 is alleged, with no averment that it is still in force or that its performance could now be enforced. In their reply brief the defendants suggest that the contract of August 1902 could not have been intended to defraud the subsequent creditor of September 4, 1902. We have some hesitation in passing upon a point raised at this stage of the proceedings, but in view of the fact that the appeal is interlocutory and the point would be available on further proceedings we consider it advisable to rule upon it.

The claim of laches was not urged in argument and is not sustainable.

If a husband purchase a residence for his family and have the conveyance made to his wife the conveyance cannot be at-

Middleditch v. Cathcart, 19 Haw. 410.

tacked by subsequent creditors unless there are other circumstances showing an intended fraud, although intended for the very purpose of keeping the property secure from subsequent claims against himself. *Sexton v. Wheaton*, 8 Wheat. 229, 242; *Mottingly v. Nye*, 8 Wall, 370; *Graham v. Railroad Co.*, 102 U. S. 148; *Dowsett v. Kapilau*, 3 Haw. 709; *Cook v. Dayton*, 8 Haw. 8.

The difficulty is often extreme of showing that a voluntary conveyance is meant to hinder, delay or defraud future creditors, especially in view of the fact that the necessary result of the conveyance is to deprive creditors of the right to resort to the property for satisfaction of their claims. But there must be something in the circumstances or position of the person making the conveyance, besides the mere fact of making it, to justify an inference of intended fraud. *Freeman v. Pope*, L. R. 5 Ch. 538; *In re Madderer*, 27 Ch. D. 526. No such circumstances are averred in this case. The bill does not even aver that the payment with the husband's money on account of the contract was made after he had given the notes of September 4, 1902. If the defendants in their argument to the judge upon the demurrer had presented this objection the plaintiff might have amended, and in sustaining the demurrer we are not to be considered as passing upon the plaintiff's right to amend.

Sweezy v. Jones, 65 Ia. 272, and *Provident Life & Trust Co. v. Mills*, 91 Fed. 435, cited by the defendants, holding that an option to purchase is not an interest in land, are not cases of contracts for sale and purchase of real estate.

It was unnecessary to aver that the contract was still in force. In an action at law "in the case of reciprocal covenants constituting mutual conditions to be performed at the same time, the plaintiff must aver performance or a readiness to perform his part of the contract." 1 Chitty, Pleading. Sec. 330. But in view of the difficulty of ascertaining otherwise than by the dis-

Middleditch v. Cathcart, 19 Haw. 410.

covery sought by the bill whether the contract is in force or not, we think that the bill contains sufficient averments as to the contract to require answer and in default of answer to authorize a decree pro confesso.

Demurrer sustained, case remanded.

A. S. Humphreys for plaintiff.

F. W. Milverton for defendants.

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME AND HUGH GALBRAITH v. CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND HAWAIIAN TRUST COMPANY, LIMITED.

MOTION FOR ALLOWANCE OF COUNSEL FEES ON APPEAL.

ARGUED APRIL 12, 1909.

DECIDED APRIL 15, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

WILLS—*allowance of fees from estate.*

Under exceptional circumstances the unsuccessful appellants from a decree of this court to the supreme court of the United States are allowed counsel fees and expenses from the estate.

OPINION OF THE COURT BY HARTWELL, C.J.

This is a motion by the attorneys for the plaintiffs, the heirs at law of the decedent, for allowance out of the estate of a reasonable sum for professional services and expenses in preparing and presenting the cause before the supreme court of the United States on appeal from the decree of this court of November 3, 1906. It appears by the affidavit of one of the

Fitchie v. Brown, 19 Haw. 411.

attorneys that they prepared the record on the appeal and a brief for the appellants; that in order to avoid the expense of going to Washington they retained counsel there and instructed him by mail and in consultations in Honolulu; that he filed a brief in reply and presented the case at the hearing and that the attorneys paid the costs and expenses amounting to \$160.10. The attorneys suggest that \$2000 in addition to the expenditure ought to be allowed. Counsel for the executors took a neutral position, declining to say anything for or against the motion. Counsel for the trustee submitted that this court has no jurisdiction to grant the motion, the question of costs in this court having been disposed of in the decree appealed from and the appellate court having made no order for payment of counsel fees for the appeal.

In a contest concerning the construction of a will it is only under very exceptional circumstances that the estate of a decedent should bear the expense of an unsuccessful appeal from a decree of this court. The counsel fees of the contesting heirs incurred in this court, amounting to \$2000, were ordered to be paid out of the funds of the estate. The question involved in their appeal, however, was novel and important and the amount involved was very large.

Ordinarily counsel fees are determined in the first instance by the judge before whom the cause is brought, and, in case of the administration of an estate in probate, by the judge before whom the proceedings are pending, but as the case was originally brought here by a submission upon facts agreed we exercise concurrent jurisdiction in the matter in order not to delay unnecessarily the closing of the executors' accounts, and direct that \$1500 for counsel fees and \$160.10 for expenses be allowed to be paid out of the funds of the estate.

C. H. Olson for executors.

W. L. Stanley for the heirs at law.

R. B. Anderson for Hawaiian Trust Co., Ltd.

Lau Dan v. Ah Leong, 19 Haw. 417.

LAU DAN, LAU TONG, AND C. APAU AND SIU LUN,
COPARTNERS, DOING BUSINESS UNDER THE
FIRM NAME AND STYLE OF C. APAU & CO., AND
LAU KANG, HUNG HOY AND CHIANG SAU, CO-
PARTNERS, DOING BUSINESS UNDER THE
FIRM NAME AND STYLE OF KWONG SING & CO.,
v. L. AH LEONG.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 14, 1909.

DECIDED APRIL 19, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

FORFEITURE—*lessee's nonpayment of taxes.*

The forfeiture of a lease upon the failure for about two weeks to perform a lessee's covenant to pay taxes may be relieved in equity.

OPINION OF THE COURT BY HARTWELL, C.J.

This was a bill for relief against forfeiture of a lease for breach of the lessee's covenant for payment of taxes. The second instalment of taxes for the year 1908 having become delinquent November 15, the defendant on December 2 entered upon the leased premises and declared the lease void for that cause and December 22 brought an action against the plaintiffs to quiet title in the premises. The object of the bill was to obtain an injunction to restrain the defendant from proceeding with the action.

The bill alleged that the failure and neglect to pay the taxes occurred "inadvertently and by mistake;" that December 3, 1908, one of the coplaintiffs, Lau Tong, tendered the taxes to the collector which were refused because the defendant had already paid them, and that then on the same day he tendered them to the defendant who refused them.

The defendant demurred to the bill on several grounds, the ground now relied upon being that all the matters alleged in

Lau Dan v. Ah-Leong. 19 Haw. 417.

the bill could as well be presented in a defense to the action to quiet title except the allegation that the failure to pay the taxes occurred "inadvertently and by mistake," and as to that allegation that the court had no power to grant relief. The demurrer was overruled, the judge, as stated in the defendant's brief, ruling that the allegation of mistake and inadvertency was unnecessary under the rule in *Garrett v. Macfarlane*, 6 Haw. 435, 439. The defendant then filed his sworn answer in which he denied the allegation as to mistake and inadvertency, alleging that the nonpayment was "wilful, designed, obstinate, persistent and consciously vexatious;" that the defendant told Lau Tong November 16 that he had not paid the taxes, to which Tong replied that he would wait until the tax office sued him, which statement he reiterated a few days after; that the defendant then said to him that he would break the lease, to which Tong replied "All right, you bring suit."

At the hearing Tong testified to the effect that he thought he had paid all his taxes until his attention was called to the matter by Francis, a deputy collector, when he opened his safe and found he was short and told the collector to call the next day; that the "second instalment of taxes was \$23 and some interest; something like \$25.60;" and it was admitted by the defendant that on the morning of December 3 his agent went to the tax office at an early morning hour and paid the taxes and as he was about to leave the tax office Tong appeared and offered to pay them.

The collector Francis testified for the defendant that after November 15, when the taxes became delinquent, "right away" he asked Lau Tong for his taxes which Tong said he did not have yet but would within a short time—within a few days; that he had three or four such talks with reference to the instalment for the first half of the year as well as for the second half; that November 24 Tong paid the first instalment and said he would pay the other shortly, but the witness did not remember that

Lau Dan v. Ah Leong, 19 Haw. 417.

Tong had asked him to come back the next day—did not think he did so or he would have remembered it; that after November 24 on two occasions he asked him to pay and was told he would pay in a few days: that when he went to his office on the morning of the third day of November (evidently intending December) Lau Tong was at the outer door and seemed to be waiting for him and said “I want to pay my taxes;” that the witness went into the office and found out that somebody else had been there and paid them and told him so.

The defendant admitted that Lau Tong would deny under oath all the averments set up in the answer. The judge in his decision found that the allegations in the answer to the effect that between November 16 and December 2 the plaintiffs were repeatedly and unsuccessfully dunned for payments of the delinquent taxes by the tax assessor had not been contradicted by the evidence of two witnesses nor by the evidence of one witness and corroborating circumstances and must therefore be taken as true; that the allegation in the answer that on November 16 Lau Tong had told the defendant that he would wait until the tax office sued him before paying his taxes and a few days after, when the defendant told him that he would break the lease, had said, “All right, you bring suit,” had not been met with the requisite amount of denial and therefore must be taken as true, and ruled upon the question whether the neglect and failure of the plaintiffs to perform their covenant to pay taxes had been so “wilful and inexcusable as to warrant the court’s denying that relief;” that it did not appear “that the breach of the covenant to pay taxes had been so culpable, long persisted in and detrimental as to warrant the court in denying” the relief sought, and that under all the circumstances a case for relief was made out upon the plaintiffs’ payment of the taxes due with interest and costs and \$100 for the defendant’s attorney’s fees. The defendant appealed from the decree entered in conformity with the decision.

Lau Dan v. Ah Leong, 19 Haw. 417.

In *Ching Tam Shee v. Hall*, 19 Haw. 190, in which a forfeiture of a lease was claimed for breach of covenants to insure, pay taxes, repair, and to build and maintain sidewalks, the court held that equity would not relieve from breach of the covenants to repair and to make and maintain sidewalks and found it unnecessary to say whether it would be granted for breach of the other covenants. The rule in *Henrique v. Paris*, 10 Haw. 411, was cited with approval to the effect that equity, regarding the performance of covenants in leases as the real object desired and that the right of entry is mere security for such performance, often relieves against a forfeiture if full and exact compensation can be made, as in case of payment of rent.

The plaintiffs' evidence does not show that their failure to pay November 15 was owing to mistake or forgetfulness, but that they intended to pay and told the collector to call again. The collector testified that they told him they would pay him in a few days. The recital in the answer of talks between defendant and the plaintiffs is not a pleading of facts but rather of evidence in support of the allegation that the nonpayment was wilful. But as correctly determined in the ruling upon the demurrer the plaintiffs' case did not require explanation of the delay and therefore the allegation in the answer that it was wilful was not responsive to the issue, whether matter of defense or not.

Whether the equity rule upon the force of responsive averments in a sworn answer is applicable to hearings on oral testimony rather than on depositions and to a statute requiring all bills to be verified by oath may admit of doubt; it certainly does not require the judge to accept recitals of conversations as literally true when not denied by two witnesses or by one witness corroborated by circumstances.

Decree affirmed.

E. C. Peters for plaintiffs.

A. S. Humphreys (*J. Lightfoot* with him on the brief) for defendant.

Dillingham v. Scott, 19 Haw. 421.

B. F. DILLINGHAM v. M. F. SCOTT; KONA DEVELOPMENT CO., LTD., AND F. B. MCSTOCKER, GARNISHEES.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 13, 1909.

DECIDED APRIL 21, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

BILLS AND NOTES—*accommodation paper*.

The payee of an accommodation note having requested its execution for the purpose of paying a debt of a third party is under no implied obligation to reimburse the accommodation maker who has paid the note.

BILLS AND NOTES—*accommodated party*.

An accommodation note having been made and endorsed for the purpose of paying the debt of a third party not named on the instrument, such third party is in contemplation of law the accommodated party to whom the credit has been loaned, and the testimony of the accommodation maker, knowing the use intended, that he signed at the request and for the accommodation of the payee cannot alter the status of the parties.

APPEAL AND ERROR—*decision of court, jury waived*.

The decision of the judge of a circuit court, jury waived, being based upon the existence of an implied promise, this court, upon finding error, will not consider whether the testimony would have sustained a finding of an express promise, but will order a new trial.

OPINION OF THE COURT BY BALLOU, J.

This case, brought up by defendant's writ of error, is an action of assumpsit to recover the sum of \$1100 which the plaintiff as maker of an accommodation note was obliged to pay at the maturity thereof and which he seeks to recover from the defendant as the accommodated party. The circumstances of the execution of the note as shown by the evidence are as follows:

The Kona Sugar Co., Ltd., a plantation corporation, had become financially embarrassed and at the suit of some of its

Dillingham v. Scott, 19 Haw. 421.

creditors brought in the first circuit, had been placed in the hands of a receiver. The suit had been discontinued, but the court had refused to discharge the receiver, as his expenses, amounting to between \$8000 and \$10,000, had not been paid and the plantation was ordered sold to realize this amount. Defendant was not a stockholder of the corporation, but was an unsecured creditor for a large amount. Plaintiff was not connected with the corporation in any way but was the promoter of several other sugar plantations one of which in particular was seeking credit in San Francisco at the time. Defendant, together with others interested, busied himself in an endeavor to raise funds to pay the expenses of the receiver and thereby to obtain the receiver's discharge and avoid an immediate sale. Plaintiff had offered to be one of ten men to contribute \$10,000 each to get the Kona Sugar Company out of its difficulties, meaning thereby, as he testifies, that he would put up the money as a business loan upon some security to be arranged later. This plan failed. Defendant and others succeeded in raising considerable money toward the payment of the receiver's expenses, the several contributions, whether by check or note, naming the defendant as payee. Defendant himself contributed about \$3000. When the funds obtained lacked \$1100 of the requisite amount defendant requested plaintiff, whom he had first met personally in an interview a few days previous, to make up the amount lacking. Plaintiff thereupon signed the note in question, payable to the order of defendant, and defendant endorsed it to H. Hackfeld & Co., Ltd., a creditor of the receiver. A representative of Hackfeld & Co., Ltd., thereupon accompanied the defendant into court and stated that its claim had been settled, and upon the settlement of other claims in open court the receiver was discharged forthwith. Three days later another suit against the corporation was filed in the third circuit under which the defendant was appointed receiver of the corporation. To what extent this was in contemplation of the parties at the time of the execution of the note is somewhat uncertain.

Dillingham v. Scott, 19 Haw. 421.

Plaintiff understood fully the use for which his note was to be put and testifies that he expected to be paid out of the proceeds of sugar then on the plantation which it was expected would be released upon the discharge of the receiver. The defendant also testified that this was the expectation, but when he was appointed receiver by the court of the third circuit the judge refused to allow the expenses of discharging the previous receiver as receivership expenses in his court so no money was available from this source. The Kona Sugar Company failed completely, its property being sold at receiver's sale and the plaintiff ultimately paid his note. Some months after the maturity of the note the plaintiff wrote the following letters which remained unanswered:

October 10, 1902.

Mr. M. F. Scott,

Receiver Kona Sugar Company,
Kailua, Hawaii.

Dear Sir:—At your request, on March 25, 1902, I gave you a note for \$1100.00, the same being an accommodation note to enable you to get the Kona Sugar Company out of the hands of Humphrey's Court. This note was made payable three months from date (March 25th) and the promise made to me was that it should be paid out of the first sugars forwarded from the plantation.

On my return from abroad, having merely made a memorandum of this note, I inquired if any word had been left of its payment and subsequently, yesterday, saw Messrs. Blackfeld & Company, who hold the note, and who informed me that it had not been paid.

I explained to them the circumstances under which the note was given and asked them to be good enough to see that the amount was paid on the receipt of the next shipment. As they have no instructions, perhaps, from you to that effect I would thank you to write them at once, as you will see that that obligation should have been cancelled ere this.

Yours truly,

(Signed) B. F. DILLINGHAM.

Dillingham v. Scott, 19 Haw. 421.

Mr. M. F. Scott,
Kailua, Hawaii.

November 4, 1902.

Dear Sir:—I wrote you a short time since calling your attention to the note which I gave you on the 25th of March and which you agreed would be paid out of the first sugar shipped to Messrs. Hackfeld & Co. I have received no reply to my letter and understand I may be called upon to pay that note. I enclose herewith your note to me for \$1100.00 dated on the same date, maturing at the same time, as the one which I gave you, which should have been done at the time I gave you my note of accommodation, but presuming it was only a matter of form, that the note would be paid in a very short time, I did not request it. Please sign the enclosed note and return to me and try and have this matter adjusted at an early date and oblige.

Yours truly,
(Signed)

B. F. DILLINGHAM.

Enclosure 1.

Mr. M. F. Scott,
Kailua, Hawaii.

January 2, 1903.

Dear Sir:—Just prior to my departure for San Francisco, under date of November 4th last, I wrote you concerning the \$1100.00 which I practically loaned you as an accommodation for a special purpose. I learn on my return that you have not acknowledged the receipt of the letter and therefore I am inclined to think the letter must have miscarried in some way. I have been called upon by Messrs. Hackfeld & Co. to pay the amount of the note and now I request you to make arrangement for immediate settlement of the same.

Yours truly,
(Signed) B. F. DILLINGHAM.

At the trial plaintiff testified emphatically that he signed the note for the accommodation of the defendant and that he looked to him for repayment. At the close of the evidence the court said:

“I think the note clearly shows a clear, legal obligation against the defendant. It seems to me that it was his legal obligation that he assumed in signing the note. I therefore find that the plaintiff has made out his claim and is entitled to judgment according to the prayer of the complaint. Judgment

Dillingham v. Scott, 19 Haw. 421.

may be entered accordingly for the plaintiff against the defendant for the amount sued for."

We must regard this as expressing the reasons for the decision of the court. It is true that the statute (R. L. Sec. 1747) requires the decision to be in writing, but where, as appears in this case, the written "decision" is prepared by the attorneys for the prevailing party and appears on the record backed and endorsed in their office wrapper, it is plainly intended only as a formal compliance with the statute and will be given no greater weight.

The decision of the court if judged solely by the reasons given is clearly erroneous. Defendant did not sign the note but endorsed it, and so far as the note shows, the legal obligations of the parties are exactly the reverse of that stated. The admitted fact that the plaintiff was an accommodation maker would not necessarily alter the status of the parties for if the defendant was also an accommodation party the ultimate liability would be on the plaintiff, while the defendant having been compelled to pay the note could recover over against him. *Gillespie v. Campbell*, 39 Fed. 724, 5 L. R. A. 698.

The contention of the plaintiff, however, is that the defendant was the accommodated party, this having been testified to by the plaintiff, and the testimony being conclusive after a judgment, jury waived, in plaintiff's favor. Under such circumstances the obligation of the accommodated party to pay the accommodation party who has been compelled to take up the instrument arises by implication of law. The defendant contends that the question of who was the accommodated party is to be judged not by the assertions of the accommodation maker but by what was actually done and that the note having been intended by both parties and actually used for the payment of a debt of the Kona Sugar Company that corporation is in contemplation of law the accommodated party.

The question thus presented is whether the accommodated party on whom the law casts the obligation to reimburse the

Dillingham v. Scott, 19 Haw. 421.

accommodation party is necessarily the party whose debt is paid with the note or its proceeds or whether it may be shown by oral testimony to be some other party who requested the transaction to be made and who received an indirect benefit from it. It is evident that a person may be accommodated within a broad use of that term without being the accommodated party in the legal sense. The accommodated party has been defined as the one to whom the credit is loaned, but this definition merely results in a restatement of the question as to whether the testimony of the accommodation party as to whom he loaned his credit is decisive after verdict or whether in contemplation of law the credit has been loaned only to the person who, in accordance with the understanding of the parties, receives the proceeds of the paper either directly or as a payment of an antecedent debt.

None of the cases cited bear directly upon this point, the peculiarity of the case at bar being that the request for accommodation did not come from the debtor, who was to receive the immediate benefit, but from the payee-endorser, so that we may assume that the maker, though with full knowledge of the use to which the note was to be put, was justified in assuming that he was accommodating, in the broad sense, the payee-endorser.

A case similar in some respects is *Lockwood v. Twitchell*, 146 Mass. 623, in which, according to the facts offered to be proved, the note was made at the request of one party to be used for the private purposes of the debtor. The court held that the note had been signed for the accommodation of the debtor, who in this case appeared as a co-maker of the note, and that in the absence of agreement the law would not imply a promise to indemnify the defendant by the person who had requested the defendant to sign from the mere fact of such request. In *Allman v. Anton*, 91 Ia. 612, the note was given for money loaned to one of the makers, and accommodation co-makers were not relieved of liability to the payee by the fact that payee had requested them to sign as "just an accommodation."

Dillingham v. Scott, 19 Haw. 421.

While the case appears to be a novel one, we are of the opinion that the accommodated party upon whom the law casts the implied obligation of reimbursing the accommodation party is the party who, in accordance with the prior understanding of the parties, receives the direct benefit from the accommodation paper or its proceeds, and that this result follows even though, as is by no means clear from the evidence in this case, the motive actuating the accommodation maker was wholly a desire to accommodate some other party requesting the loan of credit. In the case at bar the plaintiff was not loaning his credit to the defendant to be used by the defendant for his own purposes, and if the defendant had used the paper for any other purpose than to pay a receiver's debt of the Kona Sugar Co. it would have been a fraudulent diversion of the paper. The letters in evidence show that at the outset at least plaintiff looked for repayment to the proceeds of property of the plantation. The defendant equally with the plaintiff received no value in a legal sense for the use of his name as endorser. The plaintiff and defendant were both accommodation parties and the Kona Sugar Co., Ltd., was the accommodated party and the only party under implied obligation to reimburse the accommodation maker.

It is true that between accommodation parties, one of whom has paid the note, parol evidence of an express contemporaneous agreement that their liability shall be different from that expressed on the face of the paper is admissible and that plaintiff may recover on such express contract if proved. *Phillips v. Preston*, 5 How. 278; *Mansfield v. Edwards*, 136 Mass. 18. This is very different from the implied contract of the accommodated party and the case was apparently not tried and certainly not decided upon this theory. We therefore shall not pass in the first instance on the question whether the evidence would support a finding of such an express contract.

The judgment is reversed and a new trial ordered.

R. B. Anderson and *W. B. Lymer* (*Kinney, Marx, Prosser & Anderson* on the brief) for plaintiff.

M. F. Scott, defendant, in person.

See Kong v. Chillingworth, 19 Haw. 428.

SEE KONG v. CHARLES F. CHILLINGWORTH, AND
WILLIAM SAVIDGE, CLERK OF THE SENATE,
AND J. H. FISHER, AUDITOR OF THE TERRI-
TORY OF HAWAII, GARNISHEES.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED APRIL 21, 1909.

DECIDED APRIL 23, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

GARNISHMENT—*government beneficiaries.*

By the provisions of ch. 136 R. L. the salary of a territorial senator is subject to garnishment to the extent of twenty-five per cent. for payment of his debts, and as the clerk of the senate pays the salary on the warrant of the territorial auditor those officials are properly served with garnishee process. The statute is not against the 14th amendment nor in conflict with Secs. 25 or 55, Organic Act.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action to recover \$100 with interest on the defendant's promissory note of April 6, 1904. The complaint alleged that the defendant, a senator from the third senatorial district, is a government beneficiary within the meaning of ch. 136 R. L. and is entitled to receive a salary of \$400 in three equal instalments on and after the first, thirtieth and fiftieth days of the session, and contained a request that the court insert in the summons a direction to the officer to leave a true and attested copy with the clerk of the senate and the auditor of the Territory. The defendant moved that the garnishees be discharged on the grounds that a senator is not a government beneficiary as defined by Sec. 2128 R. L. and that if he were the statute would conflict with Sec. 55 of the Organic Act granting legislative power to the Territory and in violation of Sec. 25 of the act authorizing each house to punish any one not a member who shall be guilty of disrespect to the house or on account of

See *Kong v. Chillingworth*, 19 Haw. 428.

the exercise of any legislative function threaten harm to the body or estate of any member, and would be undue interference with the people's right to legislation and with senators in discharge of legislative functions. The motion was granted and the plaintiff appealed on the grounds that it was error to rule that the defendant was not a government beneficiary or that his salary as senator could not be garnished under ch. 136 R. L.

The defendant's brief claims that a senator is not a government beneficiary as under the Organic Act he derives his authority from the people of his district; that the senate is a distinct department of the government exercising sovereign powers subject only to restrictions imposed by the constitution or the Organic Act; that it would be against public policy to attach the salary of any senator or to sue him during the session; that the salaries are exempt from attachment during the session even if process could be issued against a senator; that the salary must be earned before it can be garnished; that the clerk of the senate and the auditor cannot under the statute be joined as garnishees; that the legislature did not intend to include senators and representatives as government beneficiaries, and that the statute is in violation of the 14th amendment, being class legislation discriminating against citizens in government service.

The meaning of the statute is so obvious and clear that it requires no construction. Every government official from the highest to the lowest, whether in the legislative, judicial or executive departments of the government, is necessarily included in its terms if in receipt of or entitled to a salary from the government of the Territory. *Sun Hop Sing v. Wright*, 10 Haw. 260. Whether the public is likely to be as well served by officers out of whose salaries one-fourth may be attached and applied in payment of their debts is not a question of law but of policy only. Nor can we hold the statute unconstitutional on the ground that it is against public policy that a percentage of the salaries of legislators, judges and governors, if paid by

See *Kong v. Chillingworth*, 19 Haw. 428.

the Territory, should be subject to attachment for their debts.

It is only the salaries of public officials that can thus be attached, but this is not in violation of the 14th amendment denying to any person equal protection of the laws or abridging the privileges or immunities of citizens.

Defendant's citations upon liberal construction of garnishment statutes or which refer to statutes for garnishment of debts and require the debt attached to be due and payable are not applicable to the present statute.

As senators are accustomed or entitled to draw their salaries from the clerk of the senate upon a warrant of the auditor of the Territory the statute would authorize garnishing each of those officials.

Order discharging garnishees rescinded; case remanded.

T. M. Harrison for plaintiff.

G. A. Davis for defendant and garnishees.

THE DOWSETT COMPANY, LIMITED, A CORPORATION,
v. L. L. McCANDLESS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 13, 1909.

DECIDED APRIL 26, 1909.

HARTWELL, C.J., WILDER AND BALLOU, JJ.

ESTOPPEL.—*judgment against tenant, effect on landlord.*

A judgment in ejectment in favor of M. against a tenant does not estop his landlord from subsequently bringing an action to quiet title to the same land against M. even though the landlord openly, avowedly and to the knowledge of plaintiff defended the ejectment action in the tenant's name.

OPINION OF THE COURT BY WILDER, J.

This is an action to quiet title to two small pieces of land at Halawa, Oahu. Defendant filed a plea in bar claiming that

Dowsett Co. v. McCandless, 19 Haw. 430.

plaintiff was concluded by a former judgment against the Honolulu Plantation Co. and Woodlawn Fruit Co., Ltd., in an action of ejectment for the same pieces of land brought by him, the present defendant, as plaintiff, defendants' exceptions in that action having been overruled by this court in 19 Haw. 239. The defendants in the former action were tenants of the present plaintiff and relied in their defense solely on the title of their landlord. At the request of the tenants in that action their landlord conducted and controlled the defense, the attorneys of the tenants assisting therein. The defense in the former action by the landlord in the tenants' names was open and avowed and known to plaintiff. The tenants having refused to bring up exceptions to this court, they were brought up in the name of the tenants by the attorneys for their landlord. The plea in bar having been sustained, plaintiff brings exceptions.

The general rule is that judgments bind parties and their privies in blood, in law and in estate. *George v. Holt*, 9 Haw. 47. "So far as estoppel by former judgment is concerned a grantee is in privity with his grantor, but the converse is not true that a grantor is in privity with his grantee." *Tibbets v. Damon*, 17 Haw. 203, 205.

All questions of privity having been eliminated, the sole point presented is whether the plaintiff made itself a party to the prior action within the doctrine of res judicata so as to be bound by the judgment in that action, or, briefly, whether a landlord under the circumstances shown is bound by a judgment against his tenant.

At the outset it is claimed by plaintiff that the question here involved was determined in *Kapiolani Estate v. Thurston*, 17 Haw. 312. It was definitely decided in that case that a judgment against a tenant in an action of ejectment where the landlord without being joined defended in the tenant's name would not bind the landlord in a subsequent action brought by him to recover a piece of land in the same chain of title as that sought

Dowsett Co. v. McCandless, 19 Haw. 430.

to be recovered in the first action, the title to each piece depending on the same state of facts. That ruling was affirmed on motion for rehearing, 17 Haw. 346. It is contended, however, that that case may be distinguished in that the second action was for a different piece of land although conveyed by the same deed, and that it did not there appear, as here, that the defense by the landlord in the tenant's name was open, avowed, controlled by him and known to the plaintiff. In our opinion there is no difference in principle between that case and the one at bar, and we are required to hold that in order to bind a landlord in such cases he must be summoned or, if he voluntarily appears, he must be joined as a party of record, and that it is not enough that he defend in the tenant's name even though that is done openly, avowedly and to the knowledge of plaintiff.

The cases from other jurisdictions, many of which are referred to in 23 Cyc. 1261-1262, are not in harmony, and we do not discuss them in view of the prior ruling of this court on the matter.

It is further suggested that, as it was held in the *Thurston* case that the employment of the attorney to represent the landlord in the first action was not included in the power of attorney under which he was retained, there was no showing that the landlord did defend in the tenant's name, and consequently the ruling as to the effect of the judgment on the landlord was unnecessary. The court in that case, however, did not decide the question as to the meaning of the power of attorney, as shown by the following passage from its opinion (17 Haw. 320):

"At the last trial the defense showed a power of attorney from Kapiolani, authorizing the administrator to manage her business, collect rents and income from lands that came to her under her husband's will and from those held by his trustees for payment of his debts, to manage the lands and to lease part of them at reasonable rental; 'and for the purposes aforesaid' granting the attorney power to execute instruments 'according to our

Dowsett Co. v. McCandless, 19 Haw. 430.

agreement and to sue or to defend all cases at law or in equity.' The defendant claims that this made the evidence admissible, as to engaging counsel to defend the case, showing that the administrator in so doing was acting under his power of attorney. Several considerations interfere with and perhaps preclude this inference. Express authority was unnecessary for under the circumstances of this case the law authorized the administrator thus to protect the interests of the estate. The power of attorney authorized the defense of cases 'for me and in my name.' This was not such a case. But we prefer not to decide this question upon mere inference but as a matter of law."

The plea in bar should have been overruled.

Exceptions sustained.

R. B. Anderson and W. B. Lymer (Kinney, Marx, Prosser & Anderson on the brief) for plaintiff.

A. G. M. Robertson for defendant.

THOMAS CARPENTER v. H. L. LAWSON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MAY 11, 1909.

DECIDED MAY 17, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CONSTITUTIONAL LAW—costs.

The statute, Sec. 1893 R. L., is not unconstitutional and does not impair the obligation of a contract by requiring a plaintiff to pay the costs when a judgment recovered by him in the district court is reduced one-fifth in the appellate court although the costs exceed the sum awarded him for breach of the contract sued on.

APPEAL AND ERROR—*finding in jury waived case.*

There was evidence in this case to sustain the judge's finding, jury being waived, of an express agreement for payment of a stated sum.

Carpenter v. Lawson, 19 Haw. 433.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff having obtained judgment for \$15 and costs in his action in the district court of Honolulu for the use and hire of four trestle horses, ten scaffolding planks, one water barrel, one mortar board and four mortar galvanized buckets for fifteen days at \$1 a day, the defendant appealed to the circuit court, and the parties waiving jury the judge found for the plaintiff in the sum of \$7.50. The judgment appealed from having thus been reduced more than one-fifth the costs (\$16.75) were awarded under Sec. 1893 R. L. to the defendant, and under Sec. 1894 R. L. judgment accordingly was entered making a balance of \$9.25 in favor of the defendant, the plaintiff's counsel objecting on the ground that the sections cited are in violation of Sec. 10, Art. 1 of the constitution in destroying his right to recover the \$7.50 awarded, and moving to set aside the finding as contrary to law and not supported by evidence. The objection was overruled and the motion denied, to which rulings the plaintiff excepted.

The judge considered that the evidence showed an agreement that fifty cents a day be paid for use of the things. The plaintiff testified that before procuring the materials he told defendant that he, plaintiff, could obtain use of them at fifty cents per day and that defendant thereupon told him to go and get them; that he first charged fifty cents a day and sent a bill for that amount; that he put in the bill for \$15 after the defendant did not pay fifty cents, Walker, from whom he hired the things, charging him \$1 a day. Walker testified that he charged \$1 a day and thought that a very reasonable estimate although his estimated value of the things was \$26.50. The defendant testified that he engaged the plaintiff as a plasterer on the Art Theatre building at \$6 a day, the plaintiff saying that he had all the necessary tools to complete the job; that when the plaintiff told him he did not have enough scaffolding and so on and would have to rent some, and said it would cost

Carpenter v. Lawson, 19 Haw. 433.

about \$2.50 or \$3, the defendant approved the price, but the plaintiff afterwards demanded \$7.50. Walsh, who was in charge of the building, testified that the plaintiff told him he could get the stuff and that it would cost fifty cents a day.

There was evidence then to sustain the finding. The statute is peremptory in requiring costs to be awarded to the appellant "if the defendant against whom judgment is rendered shall appeal and the amount recovered in the court below be reduced one-fifth or more," and was enforced in *Nakanelua v. Kailianu*, 5 Haw. 179; *Kamalu v. Lovell*, 5 Haw. 181; *Scott v. Apau*, 12 Haw. 157.

There is no doubt that the legislature cannot destroy all effective remedy for breach of contract since "the existence of some sufficient remedy is essential to the obligation of a contract." 3 Page on Contracts, Sec. 1765. But plaintiff's failure to recover as much in the circuit court as was awarded him in the district court results from his having claimed too large a sum in the first instance. Statutes appear to be common which require that "when on appeal the plaintiff's recovery is less than that awarded him in the inferior court" he pay the costs. 5 Enc. Pl. & Pr. 163, and *Jones v. Spencer*, 36 Ark. 82, in which such a statute is cited. It is stated that in perhaps the majority of jurisdictions an appellant who obtains a modification of a judgment in his favor is entitled to costs. 11 Cyc. 214.

No decision has been cited and upon considerable examination we find none holding that such statutes are unconstitutional.

Exceptions overruled.

G. A. Davis for plaintiff.

C. F. Clemons (Thompson & Clemons on the brief) for defendant.

In re Castle, 19 Haw. 436.

IN THE MATTER OF THE PETITION OF J. B.
CASTLE.

APPEAL FROM COURT OF LAND REGISTRATION.

ARGUED MAY 11, 1909.

DECIDED MAY 17, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

APPEAL AND ERROR--*decision of land court not appealable.*

An appeal to this court does not lie from a decision of the court of land registration.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decision of the judge of the land court denying the petition of J. B. Castle to a registered title to a certain portion of land set forth in his petition, the title to which portion was found to be in Helen Boyd.

No objection was made by counsel, but at the argument the court of its own motion questioned whether an appeal lies from a decision as distinguished from a decree of the land court, no decree having yet been entered.

The statute was originally as follows: "Appeals shall be allowed from all decisions, judgments, orders or decrees of the court of land registration to the supreme court in the same manner as appeals are taken from the decisions of the circuit judges in chambers." R. L. Sec. 2407. This section was amended by Act 43, S. L. 1907, so as to read as follows: "Appeals solely upon points of law shall be allowed from any final order, decision, judgment or decree of the court to the supreme court," with other provisions not necessary to be referred to.

In *Mutch v. Holau*, 5 Haw. 314; *Uu Wo Sang Co. v. Alo*, 7 Haw. 673; *In re Walters*, 10 Haw. 25; *Barthrop v. Kona Coffee Co.*, 10 Haw. 398, 403, and in *Kahai v. Kuhia*, 11 Haw.

In re Castle, 19 Haw. 436.

3, 5, this court held that under a statute allowing a party to appeal from any decision, judgment, order or decree the appeal should be taken from the decree. This construction of a similar statute, which has always been adhered to, requires its adoption as to appeals from the land court.

The appeal is dismissed.

C. F. Peterson for J. B. Castle.

J. W. Cathcart (*Cathcart & Milverton* on the brief) for James H. Boyd and Helen Boyd.

TERRITORY OF HAWAII *v.* CHONG CHAK LAI.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 14, 1909.

DECIDED MAY 24, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CRIMINAL LAW—*private prosecutor*.

An attorney of the complaining witness may assist in the prosecution of a criminal case by consent of the public prosecutor.

OPINION OF THE COURT BY HARTWELL, C.J.

When the defendant was arraigned in court A. S. Humphreys stated that he was associate counsel for the prosecution. The defendant's counsel objected to his appearing on the ground that he was employed, as he said he was, by the Chinese consul. The city and county attorney stated that Humphreys was assisting the prosecution. After argument in which the county attorney did not participate the court reserved for our consideration the question of the validity of the defendant's objection, stated in the defendant's brief in the following form: "Can an attorney employed by the complaining witness be permitted in this jurisdiction to take part in the prosecution of a defend-

Territory v. Chong Chak Lai, 19 Haw. 437.

ant under indictment for the alleged violation of a territorial statute?" The statute relied upon is Sec. 1551 R. L. in Ch. 105, relating to the attorney general, reading as follows:

"He shall not receive any fee or reward from or in behalf of any person or prosecutor for services rendered in any prosecution or business to which it shall be his official duty to attend; nor be concerned as counsel or attorney for either party in any civil action depending upon the same state of facts."

Similar statutes in Massachusetts, Michigan and in Wisconsin have been construed as giving to the attorney general exclusive duty to conduct and manage criminal prosecutions and as declarative of a public policy against the employment by private persons of attorneys to conduct or even assist in the prosecution of criminal cases. *Commonwealth v. Knapp*, 10 Pick. 477, 481, 482; *Commonwealth v. Williams*, 2 Cush. 582, 585; *Commonwealth v. Scott*, 123 Mass. 222, 233; *Commonwealth v. Gibbs*, 4 Gray 146; *Biemel v. The State*, 71 Wis. 444; *People v. Hurst*, 41 Mich. 328, 330; *Sneed v. People*, 38 Mich. 248; *Meister v. People*, 31 Mich. 99; *People v. Bemis*, 51 Mich. 422, 424. The policy of allowing assistance of a private prosecutor is approved in *People v. Tidwell*, 4 Utah, 513; *People v. Blackwell*, 27 Cal. 66; *Burkhard v. State*, 18 Tex. App. 599. In Maine, Kansas, Iowa and Florida statutes like that now under consideration are held not to exclude the employment of private counsel. *State v. Bartlett*, 55 Me. 200; *State v. Wilson*, 24 Kan. 138; *State v. Shinner*, 76 Ia. 147; *Thalheim v. State*, 38 Fla. 169; 20 So. 938.

The defendant insists that the judicial construction placed upon the statute in Massachusetts, where it appears to have been enacted in 1807, should be followed here, citing *Cathcart v. Robinson*, 5 Pet. 264; *McDonald v. Hovey*, 110 U. S. 628; *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S. 263.

Territory v. Chong Chak Lal, 19 Haw. 437.

The presumption that the Legislature in adopting the statute of another state or of a foreign country adopts the construction of the statute made by the courts of that state or country cannot be permitted to prevail against a plain and obvious interpretation of the statute. *Pratt v. Miller*, 109 Mo. 78 (32 Am. St. 656). "The imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home State." Endlich on Interpretation, Sec. 371. "While * * * it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances. We concur in the interpretation placed upon the Utah statute by the Supreme Court of Utah, as one required by the obvious meaning of its provisions, and we do not feel obliged, by the above rule, to reject that interpretation because apparently the highest court of the State from which the statute was taken has, in a single decision, taken a different view." *Whitney v. Fox*, 166 U. S. 637, 647. And where the statute is too clear to require construction there is no occasion to refer to decisions elsewhere. The practice in Hawaii has always allowed the public prosecutor to engage or permit private counsel to assist in prosecutions, and there is no reason to suppose that this practice was not in existence from the time of the earliest enacted laws. The statute in its present form appears in Sec. 9, Act of July 11, 1851, relating to district attorneys, Sec. 1092 C. C. (1859), and in Sec. 5, Act of July 27, 1866, defining the duties of the attorney general. At an early date the attorney general appointed "agents" to "do the duties of district attorneys" in certain localities in prosecuting minor offenses, the agents having the right to "the attorneys' fees growing out of any cause by them prosecuted." Act to Organize the Executive Departments, April 27, 1846, p. 262. Act 118 S. L. 1907, in authorizing the city and county attorney to prosecute criminal cases before district magistrates,

Territory v. Chong Chak Lai, 19 Haw. 437.

expressly declares "nothing herein contained shall prevent the institution or conduct of proceedings by private counsel before magistrates under the direction of the City and County Attorney." (Sec. 111, Par. 3.)

The cases cited by the defendant set forth reasons of public policy for requiring prosecutions to be conducted solely by attorneys officially authorized lest the dispassionate course suited to an official prosecution may degenerate into attempts to harass and annoy from motives of revenge or ill will rather than such as are supposed to actuate the course of a law officer whose official responsibility is measured solely by a desire to vindicate the majesty of the law.

But we do not consider that the statute presents any question for construction as to its meaning. The attorney general and his deputies are required to appear for the Territory in all public prosecutions and are responsible on their oaths of office for the performance of their duties without fee or reward. They cannot delegate the performance to private persons nor is this done by permitting an attorney employed by private persons to assist in trials. The attorney general does not thus relinquish his control over a case. It would be the duty of the court to restrain any exhibition of spite or any attempt at persecution on the part of counsel so engaged. The public conscience would quickly be aroused by any appearance of administering the criminal law for merely private ends. Juries would be prompt to show by their verdicts their sense of such misuse of public functions. Indeed, astute counsel would avoid the impression of trying to wreak private vengeance under the pretence of assisting in a fair and honorable prosecution of crime.

Whether a statute is desirable which shall prohibit the attorney general from obtaining or accepting the aid of attorneys to be paid for their services, either by the government or by private persons, may admit of grave doubt in view of the hitherto unquestioned practice, but the statute does not prohi-

Territory v. Chong Chak Lai, 19 Haw. 437.

bit the practice. It is one of the rights of attorneys to appear in all the courts of the Territory "in behalf of third persons who may choose to retain them for the prosecution or defense of actions civil, criminal or mixed" (Sec. 1700 R. L.), and while this does not authorize appearing in cases in which clients are not parties this statute appears to recognize the propriety of their being authorized to appear as assistant counsel for the prosecution.

The question submitted is answered in the affirmative.

A. S. Humphreys for the Territory.

J. Lightfoot (*Judd & Lindsay* also on the brief) for defendant.

M. F. Prosser (*W. A. Kinney* also on the brief) amicus curiae.

ALEXANDER LAZARUS *v.* LENA GRACE ROSE- WARNE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 12, 1909.

DECIDED MAY 25, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

TRUSTS—*bill to declare.*

Bill dismissed on the evidence. Decree affirmed.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff's bill seeks to establish a trust by parol in his conveyance to his niece, the defendant, April 11, 1905, of a parcel of land in Honolulu, and in his conveyance to her April 22, 1905, of certain land at Kaupo, Maui, and his bill of sale to her dated April 22, 1905, of a piano, with certain pictures, chairs, sofas, rings, bracelets, watch, rugs, bed, cash register,

Lazarus v. Rosewarne, 19 Haw. 441.

trunks, sewing machine and tables. The bill alleges that the defendant had agreed with the plaintiff that he should appoint her his trustee to take care of his property and that on account of his confidence in her he deposited with her \$1000 he had saved and kept buried in the ground and which upon his attorney's advice was afterwards paid to his wife; that after the execution of the deed and bill of sale he collected the rents on the premises conveyed with the understanding that defendant was acting as his trustee; that he was then in the employ of said defendant's mother and was "solely under her influence and had his full confidence" (referring perhaps to the niece); that all the property he had left was a piece of land in Honolulu mortgaged for over \$6000; that the defendant conveyed to a co-defendant, Maria C. Andrade, a portion of the land in Honolulu conveyed to her by the plaintiff, said Maria then knowing that the said Lena "was only acting as a trustee for the plaintiff;" that when the deeds and bill of sale were made the plaintiff "was enfeebled in mind and ignorant as to his rights in the premises," and that defendant, well knowing his condition, by fraud, wilful misrepresentation, fraudulent concealment and suppression of the facts, and knowing his confidence in her, procured his order for paying his money to her and procured the deeds and bill of sale without any consideration.

The defendant's answer denies that either of the deeds or the bill of sale was made on account of any agreement of trust or for any other reason than that the plaintiff, being sued for divorce by his wife in October 1905, which was granted February 6, 1906, obtained from the niece \$300 from time to time prior to the divorce, in order to enable him to pay costs, counsel fees and alimony, upon his agreement to convey to her property enough to cover it; that April 11, 1905, at his solicitation, she bought the land for \$1000 which sum the wife required in settlement with him and for release of dower, and that April

Lazarus v. Rosewarne, 19 Haw.-441.

22, 1906, the plaintiff, in payment of the \$300, conveyed, as we understand the pleadings, certain other land to her and executed and delivered to her the bill of sale in consideration of \$490 which she paid him.

During the trial, the evidence failing to show that the co-defendant Maria Andrade purchased with knowledge of any trust, the plaintiff discontinued as to her. The judge after hearing the case dismissed the bill on the ground that it was not sustained by evidence.

The plaintiff testified that about a month before the papers were made his sister told him to turn his property over to his niece to manage because "you are a drinking man, you will get drunk and squander everything," and again, because he "would be busy and go off on a spree with women and have a good time;" that he "signed the first paper" at the office of Mr. Dunne, former assistant United States district attorney, where his sister and niece told him that the "paper" was "to give them the right to take charge of my property;" that the other papers were drawn some days after by Antone Manuel, messenger of the federal court, there being another paper for 22.02 acres at Kaupo, Maui, the second and third papers being drawn by Manuel and signed by the plaintiff at the saloon where he worked; that he collected the rents on the Honolulu property and turned them over to his niece thinking she would deposit them in the bank and that he did the same with his wages, the sister and the niece giving him to understand that whatever he turned over to them would be deposited in the bank and that he had over \$1000 there; that he had over \$300 there "when they took charge of my affairs;" that he got another lawyer to bring his wife's divorce suit against him; that he collected the rents while he was living with his wife until "stopped by them" (apparently until his divorce February 6, 1906,); that he had not known that his niece claimed the land until recently when he heard that it was sold to a Portuguese whose daughter told

Lazarus v. Rosewarne, 19 Haw. 441.

him her mother had bought it; that he had a pass-book in Bishop & Co.'s Saving Bank in which he deposited \$20 in the niece's name to pay for services in taking charge of his property and that he had some money in the Phoenix Loan Association Bank which he had changed to her name; that when he signed the bill of sale he delivered to his niece all the personal property named in it because "they told me, you take those personal effects down to the house; I had no right to look out for them; I would have a good time and be damaging them;" that after he made the deeds and bill of sale he went two or three times to the niece to recover his property; that they asked him if he had money that he had placed somewhere else; he told them he had \$1000 in gold he had buried under ground—under the house in which he lived with his wife; that after the papers were served he gave this to the niece who had told him that she would take care of it; that when he "made arrangements for the divorce" Dunne told him that if he would pay the \$1000 he could recover his property and he went to his niece to get it and she returned it to him at Dunne's office and he paid it to his wife who "would have no further claim on my property."

The only witness corroborating the plaintiff to any extent is Clark who testified that the plaintiff was always called a lolo (lummox); that he heard a talk between the plaintiff and the defendant and her mother in 1905 that "there was going to be a trust deed between them."

Manuel testified for the defendant that he drew the bill of sale at the plaintiff's request the plaintiff giving him a list of the articles named in it, and that the plaintiff acknowledged it at his saloon, the witness first having read or explained it to him and nothing having been said about any trust; that he thinks Dunne drew the deed of April 11, 1905, of some property on the slope of Punchbowl which the plaintiff acknowledged before the witness in Dunne's office, at whose request he read it over to the plaintiff; that he drew the deed of April 22 of

Lazarus v. Rosewarne, 19 Haw. 441.

property on Maui, which he read to the plaintiff and which the plaintiff acknowledged before him; that nothing was said about any trust or that Lena Rosewarne got the property in trust; that the \$1000 was paid to Dunne in his office either by Mrs. Juen (the mother) or the defendant, he is not sure which; that it was said then that the payment was "about comprising the divorce proceeding."

Mrs. Juen testified for the defendant that she never had any conversation with the plaintiff about placing his property in trust with the defendant; that the plaintiff wanted Lena to buy the Kinau street property in order to get money to pay his wife, and came to their house and said "Dunne wants to see you;" that she went to his office with the defendant and there Dunne said "Your uncle told me he wants to sell you the land. Do you want to buy the land?" and afterwards wrote the defendant to know whether she was willing to pay \$1000; that the plaintiff never paid any money to her or to the defendant to put into the Phoenix Savings Bank; that the plaintiff and defendant talk in the English language; that the \$1000 were paid to Dunne for the Kinau street land which the plaintiff wanted to sell to Lena; that nothing was said about the defendant holding the property in trust for the plaintiff; that the \$490 (mentioned in the bill of sale) were paid to the plaintiff by the defendant who got the money from the witness and that the deed of April 22 was made to the defendant to pay her the \$300 he owed her.

The defendant testified that she bought the Punchbowl (Kinau street) land of the plaintiff for \$1000 and paid it to him after the settlement of his divorce, it being understood that she was to pay it when his wife released her dower; that she paid him \$490 for the personal property and \$300 for the Maui land; that the plaintiff made over to her as a birthday present his Phoenix Company book in which six monthly instalments were paid amounting to about \$60 and

Lazarus v. Rosewarne, 19 Haw. 441.

that she afterwards paid in money, finally drawing out the entire deposit amounting to something like \$300; that the Maui land was not worth \$300; the personal property about \$200; that she let the plaintiff keep the diamond ring worth about \$80; that it was not until after the wife released the dower, February 1906, and was paid the \$1000, that she collected the rents, up to that time the plaintiff collecting them although the deed was executed ten months before; that after the divorce the plaintiff never asked her for the rents or property and never deposited any money with her nor did she get any from him; that she borrowed the \$1000 from Mr. Picker and the \$490 for the personal property from her mother.

The least we can say about the case is that the bill was not sustained by the evidence and was properly dismissed.

Decree affirmed.

W. C. Achi for plaintiff.

C. F. Clemons (*Thompson & Clemons* on the brief) for defendant.

WAIALUA AGRICULTURAL CO., LTD., v. OAHU RAILWAY & LAND CO., LTD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 17, 1909.

DECIDED MAY 25, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

COURTS—*opinions, operation and effect of.*

Opinions like other instruments are to be read as a whole, each part in the light of the remainder.

INTEREST—*time from which it runs.*

On rent accrued on an instrument in writing interest runs, under R. L., Sec. 2693, from the date when the rent became due, even though its amount was not expressed in the instrument.

Waialua Agr. Co., v. O. R. & L. Co., 19 Haw. 446.

OPINION OF THE COURT BY PERRY, J.

The past history of this litigation is sufficiently stated in the opinions of this court reported in 16 Haw. 520 and in 18 Haw. 81 and 526. At the new trial had in accordance with the opinion reported in 18 Haw. 81, evidence was introduced by the parties upon the subject of the rental values for any purpose of the acreages used by the plaintiff and of the values for pasturage of the acreages used by the defendant. The circuit judge, jury waived, gave judgment for the plaintiff in the sum of \$2218.46. Plaintiff excepted. Of the exceptions but two are now relied upon, one being to the apportionment made by the lower court of the total rent of \$3780 paid annually by the plaintiff and the other to the disallowance of interest prior to judgment.

The trial court found, and its findings are not now questioned, that during the period of five years involved in this action the rental value for any purpose of the acreages used by the plaintiff, in an unimproved condition, was \$5 per acre per year and that the rental value for pasturage of the acreages used by defendant was eight cents per acre per year. It also found that the acreages used by the parties were as follows: From October 1, 1898, to October 1, 1899, by the plaintiff, 315 acres and by the defendant 12,737 acres; from October 1, 1899, to October 1, 1900, by the plaintiff, 1959 acres and by the defendant 11,093 acres; from October 1, 1900, to October 1, 1901, by the plaintiff, 3179.5 acres and by the defendant 9872.5 acres; from October 1, 1901, to October 1, 1902, by the plaintiff, 3962 acres and by the defendant 9090 acres; from October 1, 1902, to October 1, 1903, by the plaintiff, 4362 acres and by the defendant 8420 acres. The sums found to be due by the defendant to the plaintiff were as follows: For the first year above stated, \$1,484.85; for the second year, \$314.02; for the third year, \$178.89; for the fourth year, \$133.85 and for the

Waialua Agr. Co., v. O. R. & L. Co., 19 Haw. 446.

fifth year, \$106.82, or a total of \$2218.46. Both from the language of his opinion and from the results reached by him, it is clear that the trial judge apportioned between the parties the \$3780 total rent each year in the ratio that the values of the acreages used by the parties bore to each other.

The contention is that in so doing the trial court departed from the standard of apportionment laid down by this court in 18 Haw. 81, that the decision last referred to is now the law of the case and that neither the trial court nor this court is at liberty to disregard it or to set it aside.

This exception cannot be sustained. The rent was apportioned by the trial court in the ratio declared in the opinion in 18 Haw. 81 to be the correct one. The language used at page 88 of 18 Haw. in stating the rule of proportion was inexact as will appear from a reading of the other parts of that opinion as well as of the opinion in 16 Haw. 520 and 18 Haw. 526. The syllabus in 18 Haw. 81, prepared by the court, expressly declares *that the ratio between such values determines the percentage of the total rental of \$3780 to be borne by each party.* In 16 Haw. 520, at page 522, we said:

“We construe the agreements, however, as requiring the plaintiff to pay for the use of the land not the definite sum ascertainable by taking the ratio between the respective acreages used by the parties, but by *considering the values of the land so used.*” And again at page 525, “The parties, as we think, meant to fix the rent payable by the plaintiff to the defendant on the basis of the lowest reasonable estimate of the values of the respective areas of land varying of course from time to time to correspond with the values of the lands used by the plaintiff.”

This language was repeated in 18 Haw. 81, at pages 85 and 86, and in 18 Haw. 527, the court recited its former ruling that the defendant was required to pay for the land it used an amount “which would be a fair minimum *percentage of the total rental* paid by the plaintiff to be ascertained by consider-

Waialua Agr. Co., v. O. R. & L. Co., 19 Haw. 446.

ing the lowest reasonable estimates of the values of the areas used by each." The essence of the ruling so made and repeated is that the total rent of \$3780 for each year is to be *apportioned* between the parties *in the ratio between the values of their respective areas*. Opinions like other instruments are to be read as a whole, each part in the light of the remainder.

On the subject of interest there is great conflict in the authorities, some of it, perhaps, apparent only. In distinguishing between liquidated and unliquidated demands some courts appear to have in mind one definition of those terms and other courts another. Then again some of the decisions are based upon statutes and others are made in their absence. With reference to unliquidated demands interest is allowed in some cases from the date when the principal became due, in others from the date of demand, in others from the date of the institution of the action, and in still others, perhaps a majority of them, from the date of verdict. The reasoning in favor of the last named rule is that where the existence of the debt is in doubt and its amount uncertain, a party is not in a position to make or tender payment and should therefore not be called upon to pay interest except from the time when both of these disputed questions have been settled by judicial proceedings. On the other hand, it may well be said, in favor of the rule that interest shall date from the accrual of the right of action, that although the aid of a court is necessary in order to settle the controversy as to whether a debt existed and as to its amount, nevertheless the fact remains that the defendant during the whole of the intervening period has received the interest on, or otherwise had the use of, the money found by the court to be due, and that the plaintiff has been deprived of such interest or use. What the better rule may be in the absence of statute we need not say, for we have a statute which covers the point. R. L. Sec. 2693, as amended by Act 51, 1905, provides: "When there is no express contract in writing, fixing a different rate of interest,

Waialua Agr. Co., v. O. R. & L. Co., 19 Haw. 446.

interest shall be allowed at the rate of eight per cent. per annum, for all moneys after they become due on any bond, bill, promissory note or other instrument of writing, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and for money received to the use of another, from the date of a demand made." Eliminating unnecessary portions, it is as though the command of the statute were that "interest shall be allowed * * * for all moneys after they become due on" * * * any "instrument of writing." The language is clear and unambiguous. The rent for which judgment has been given in the case at bar became due on an instrument in writing. There can be no doubt that the agreement which this court has construed in its various opinions above referred to is such an instrument. The statute makes no distinction, with reference to moneys due on a written instrument, between cases in which the amount is definitely stated in the instrument and those in which the provision as to the amount is such that the aid of a court is necessary in order to definitely determine it. In *Heissler v. Stose*, 131 Ill. 393, the action was for rent alleged to be due on a written lease. The provision of that instrument concerning the rent was that its amount should be "made and agreed upon by three disinterested parties owning and renting property in Chicago." The referees failed to agree and the amount was determined by a jury. The Illinois statute was practically the same as ours, its provision being that interest be allowed "for all moneys after they become due on any bond, bill or promissory note or other instrument of writing." The court held that the lease was an instrument of writing within the meaning of the statute and that after the rent became due the plaintiff, by the express terms of the statute, was entitled to recover interest thereon in spite of the fact that the amount was left undetermined in the lease. See also *Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 338. In *Chulan v. Princeville Plantation*, 5 Haw. 84, 90, an equity case, the

Wai'alua Agr. Co., v. O. R. & L. Co., 19 Haw. 446.

court allowed interest from the date of the writ only. The portion of the opinion relating to this subject is very brief and no reference is made to the statute. Whether the court in writing its opinion overlooked the statute or regarded the case then under consideration as not coming within its provisions does not appear. No later decision on the same point has as far as we are aware been rendered in this jurisdiction. Even if the *Chulan* case, on the subject of interest, is not distinguishable from that at bar we do not feel that we ought, in view of the plain language of the statute, to follow the rule there adopted.

The exception to the disallowance of interest is sustained and the case is remanded to the circuit court of the first circuit with directions to allow the plaintiff interest, at the legal rate, upon each annual instalment of the rent already awarded from the date when it became due and to enter judgment accordingly.

D. L. Withington (*Castle & Withington* on the brief) for plaintiff.

M. F. Prosser (*Kinney, Marx, Prosser & Anderson* on the brief) for defendant.

MARY ATHERTON RICHARDS v. CARL ONTAI,
JAMES ONTAI AND HENRY ONTAI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 11, 1909.

DECIDED MAY 27, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

LANDLORD AND TENANT—*construction of lease.*

Under a lease the material portions of which are set forth in the opinion, it is held that the grant to the lessee includes all of the flow of an artesian well on the excepted premises other than water sufficient for the excepted buildings and grounds in the condition in which they were at the date of the lease,

Richards v. Ontai, 19 Haw. 451.

EVIDENCE—*parol evidence to explain contract.*

Acts and declarations of the parties prior to or contemporaneously with the execution of a lease are inadmissible in aid of its construction.

Id.—*practical construction.*

Practical construction of a lease is inadmissible to show its meaning where its language is clear and unambiguous.

Id.—*scintilla.*

A mere scintilla of evidence is insufficient to support a finding.

CONTRACTS—*meeting of minds.*

Certain letters held not to constitute a contract, because the minds of the parties did not meet.

ESTOPPEL—*reliance necessary.*

There is no estoppel when the party claiming it did not rely upon the alleged representation and was not misled by it.

CUSTOMS AND USAGES—*sufficiency of evidence of.*

The evidence in this case held insufficient to support a finding of a custom, binding upon individuals in the absence of a contract, that compensation for the use of water be paid semi-annually in advance.

OPINION OF THE COURT BY PERRY, J.

This was an action of assumpsit brought to recover \$625 alleged to be due by the defendants to the plaintiff for rent under a certain lease of premises known as the Kauluwela Lodgings situated in Honolulu. The defendants by their answer admit that the rent accrued against them and plead by way of set off a claim in the sum of \$1090.32 for the use of water from January 1, 1908, to July 1, 1908, furnished by the defendants to the plaintiff for certain laundries erected by the plaintiff upon a piece of land known as the park. The verdict was for defendants in the sum of \$246.50. Plaintiff excepted.

The main issue in the case is whether the water for the use of which compensation is claimed in the set off was granted in the lease to the lessees or reserved to the lessor.

Richards v. Ontai, 19 Haw. 451.

The lease demises "all that portion of land on Vineyard street, Kauluwela, known as Kauluwela Lodgings, (two and a half acres more or less) with the buildings and improvements thereon excepting the buildings and grounds here following:— The Kindergarten Building and its yard and grounds; the Cottage and grounds now occupied by Mr. Poepoe; the entire building containing the Dispensary and the Hale Aloha; the building containing the swimming tank and the vacant lot known as the Park." Later in the instrument the following clauses are found:

"And it is further understood and agreed that said parties of second part, their executors, administrators or assigns shall have the right into and the sole ownership excepting as inhabited" (inhibited) "by the provisions of this lease, of all of the water upon said premises and said parties of the second part, their heirs, administrators or assigns can dispose of said water either by sale thereof if they so desire within the term of this lease, so that no injuries shall accrue to the premises or its water rights, nor can this water privilege of water rights be sold, transferred or assigned to any other parties or persons or corporations or co-partnership without the written consent of the party of the first part, her heirs, executors, administrators or assigns or legal representatives.

"And it is further understood and agreed that all and any sums of money that comes from the sale of water shall be the sole property of the parties of the second part, their heirs, administrators, executors and assigns, and said parties of second part shall have the right of way for laying pipes through that part of the premises known as the Park without let or hinderance, they not committing waste in the laying of said pipes and to sell said water excepting that reserved herein, when and to whom they please."

Undisputed evidence showed that at the date of the execution of the lease the only water on the premises, demised or excepted was that coming from an artesian well situated on the vacant lot known as the park. To construe these provisions as securing to the lessees merely the water on the demised

Richards v. Ontai, 19 Haw. 451.

premises, as contended for on behalf of the plaintiff, would be to render the admitted grant of some water meaningless and ineffectual. It is unnecessary to do so. We think that the ordinary reading of these and the preceding provisions requires the construction that the water granted is that to be found upon any portion of the premises described earlier in the lease, whether demised or excepted. While the language used is susceptible of improvement, it clearly expresses the understanding and intention of the parties that to the lessees should belong for the term of the lease all of the water on the premises subject only to the reservations and limitations in the instrument stated. The lessees shall have "the sole ownership of all of the water" is the clear statement which the parties subscribed to. The succeeding declaration that the lessees "can dispose of said water * * * by sale thereof if they so desire" even though qualified by the requirement of the lessor's written consent to any sale of "this water privilege of water rights" emphasizes the fact that the intent of the parties was as here stated. The same may be said of the express agreement that all proceeds of the sale of water "shall be the sole property" of the lessees and that the lessees "shall have the right of way for laying pipes" through the park. This right of way was necessary to the lessees in order to obtain water from the well and perhaps also to render practicable sales of water for use on property situated in the vicinity of the park.

The only clause limiting the quantity of water thus granted to the lessees is that appearing at the end of the lease and reading as follows: "It is agreed moreover that the party of the second part shall supply to the party of the first part free of charge all water required for buildings and grounds expressly reserved under this lease." The plaintiff's contention is that under the lease the lessor was entitled to as much water as was at the date of the lease or should be at any time thereafter required for the excepted premises, provided only that

Richards v. Ontal, 19 Haw. 451.

such use did not interfere with the use by the defendants of water for tenement purposes or for the permitted assigns of the defendants. We cannot so construe the lease. The provision last quoted,—and there is no other reserving or excepting water to the lessor—secures to the lessor water sufficient for the excepted buildings and grounds. The standard of measurement is the requirement of the excepted property at the date of the lease. The parties are presumed to have made their contract with reference to conditions as they existed at the time. It is apparent from the lease as a whole that they believed that the supply of water from the well was sufficient to meet the requirements of the excepted property, and those of the demised property, and that a surplus would still remain for possible sales by the lessees. The use of the word “buildings” in the clause reserving water to the lessor is significant. The water reserved was such as would be sufficient for the buildings reserved, that is to say, the buildings then existing, and not for additional buildings erected where none existed at that time. As will appear hereafter it is unnecessary to decide at this time whether the plaintiff is entitled to use on other property the water at the date of the lease used or required for any particular portion of the excepted premises.

A number of the exceptions raise the question of the correctness of rulings excluding evidence of acts and declarations of the parties made prior to, contemporaneously with and subsequent to the execution of the lease and tending to show that the parties intended and understood the provisions of the lease concerning water to mean what the plaintiff now contends that they mean. In so far as such evidence related to acts and declarations made prior to or at the time of the execution of the lease it was not admissible because the writing is deemed to express the agreement of the parties as finally concluded between them; and the remainder of the evidence so offered is likewise inadmissible because the language of the instrument

Richards v. Ontai, 19 Haw. 451.

under consideration is clear and unambiguous. Where the latter is the case there is no room for the application of the rule as to practical construction by the parties. It may be added that evidence tending to show the physical condition of the premises at the date of the lease was freely admitted at the trial, and correctly so.

It is further contended that the trial court erred in excluding evidence tending to show a contract in writing between the parties fixing the amount payable by the plaintiff to the defendants for the use of the water at \$15 per room per year. The undisputed evidence showed that about the month of August, 1907, the plaintiff began the construction upon the vacant lot known as the park of two wash houses containing twenty-two rooms, and thereafter completed the same, and that in all matters relating to these laundries as well as to the leased property generally, the plaintiff's husband, Theodore Richards, acted for her. The writings excluded consist of four letters. In the first of these dated August 1, 1907, and addressed by Richards to Ontai Brothers the plaintiff, referring to her purpose to build the laundries, offers the lessees for water to be supplied from the artesian well to the twenty-two laundries payment at the rate of \$15 per year per house, "such sum to be paid quarterly in advance during the life of the present leases (ten years) with the different companies renting the wash houses," making the offer conditional on maintenance of the existing lease, and adds the further condition that the lessees will not undertake to sell any more water without consultation with the lessor and that payment is to be made for each room for the time only that it is occupied. Under date of August 2 a letter signed by Carl Ontai was sent to Richards in which the latter's offer contained in the letter of August 1 is recited in detail. The writer states that the offer is accepted but adds another term, "that the washmen be allowed to cut the grass in the boys' field free of charges dur-

Richards v. Ontai, 19 Haw. 451.

ing the presence of existing leases (ten years.)” On August 6 Richards wrote to Carl Ontai saying that the clause relative to the grass “is inadmissible in any agreement between us.” No offer to prove any written reply to this last mentioned letter was made. The only other letter offered in evidence was one dated August 31, 1907, addressed to Ontai Brothers by Richards in which the latter says in part:

“Secondly, I am going to live up to my agreement and pay as expressed in my letter of August 1, and pay you water rate on the laundries occupied (although by the terms of the lease I have a perfect right to the water without payment) at least for a time depending entirely upon our relations otherwise, but the above is conditioned upon my right to have all such payments apply to the debts of Carl Ontai to myself and Mrs. Richards until such debts are entirely wiped out. Thirdly, I am compelled to warn you that I shall expect any one who occupies my place as a tenant to live up to the laws of the land of which matters I have spoken before.”

These letters standing by themselves do not in our opinion constitute a contract. They fail to comply with the ordinary requirement that there must be a meeting of the minds of the parties. To the offer of August 1 Ontai proposed a new term. That new term was rejected by Richards and no answer, as far as the writings go, was ever made to such rejection. This view is emphasized by the contents of the letter of August 31. The terms there proposed were materially different from those expressly stated in the earlier letters. The duration of the arrangement there suggested was to depend entirely “upon our relations otherwise,” whatever that may have meant, and not upon the definite term of ten years as suggested in the earlier letters, and was to depend further upon Ontai’s “living up to the requirements of the law of the land.”

Plaintiff also contends that prior to the letter of August 1 Richards and Carl Ontai had entered into an oral contract on the subject of water rates. While some evidence was adduced or offered of talks between these two men on the subject, the

Richards v. Ontai, 19 Haw. 451.

talks constituted at best merely a part of the same negotiations. The two men evidently regarded the talks as indefinite or incomplete and substituted for them the series of letters already referred to. Under these circumstances no finding of a contract can be predicated on such evidence.

Mr. Richards, in the course of his testimony relative to the letter of August 6, 1907, and in reference to the cutting of grass on the boys' field, stated that Carl Ontai had some time subsequent to that date said "it is all right." Passing for the moment the questions of the effect of an oral acceptance of the contract as modified by the letter of August 6, and of the authority of Carl Ontai to bind his brothers in the matter, this statement might at first sight seem to be some evidence tending to show such acceptance. We believe, however, that the remark must be regarded as a mere scintilla, insufficient under the circumstances about to be mentioned to support a finding of acceptance. It stands by itself. Following this statement the same witness, Richards, made a number of direct and unequivocal statements, which are undisputed upon the record, to the effect that during the whole period commencing with some time between August 6 and August 31, 1907, and continuing to and including the day of the trial his belief and position had been that the water from the artesian well needed for the laundries was the property of the plaintiff to be used as she pleased without compensation to the Ontais; that he (Richards) would "pay him" (Ontai) water rates "as long as he maintains those relations with me which are understood between us; that I wanted him to hold up his agreement with me or he need not expect \$15;" that "I told him if he did not live up to his agreements with me that he need not expect the continuation of my payment of \$15;" that prior to the 31st of August, 1907, he (Richards) had convinced himself that he "had a right to take the water from the well for the wash houses without any permission or consent of On-

Richards v. Ontai, 19 Haw. 451.

tai;" that at the time of writing the letter of August 31 "I had looked up the lease and arrived at the conclusion that I have arrived at now, that I had rights but could waive them if I wished to and could at any time cease to pay Ontai if he did not live up to his agreement with me with reference to the Kauluwela Lodgings;" that any payment by him (Richards) of water rates to Ontai was "a gratuity;" that the reason that he did not pay any water rates after December, 1907, was that they had not "lived up to their agreements;" that the payment of water rates would continue only as long as the "moral status of the Kauluwela Lodgings was correct," "I put that in definitely;" that he had refused to pay water rates for the period succeeding December, 1907, because he owed Ontai nothing for the water since he had the right to it under the original lease. There were other parts of Richards' testimony to the same effect and no evidence from any other source to contradict this. Upon this state of the evidence we could not uphold a finding, based upon the scrap of evidence quoted, that a contract in the terms attempted to be arranged by the letters of August 1, 2 and 6, was concluded.

Even if, however, it could be held that the scrap of evidence under consideration is not a mere scintilla but is sufficient to support a finding that the offer framed in the three letters was orally accepted by Carl Ontai, still the undisputed evidence would require a finding, and permit of none other, that the contract as so reached, partly in writing and in part orally, was repudiated and cancelled by Richards as early as August 31, 1907; that such cancellation was concurred in by Carl Ontai and that both parties proceeded thereafter as though there had been no contract.

Nor is the situation altered by the evidence relating to the water rates for November and December, 1907. Evidence was offered tending to show that Richards credited the sum of \$55, being the total of water rates for November and December,

Richards v. Ontai, 19 Haw. 451.

1907, at \$15 per year per laundry, on a note due by Carl Ontai to plaintiff, and that Carl Ontai gave Richards a receipt for the amount as water rates for the two months. Assuming, that which there is no evidence to show, that Carl's brothers had knowledge of this payment and ratified it, they were, nevertheless, at liberty to charge a higher rate for water thereafter taken, just as Richards was at liberty to terminate the taking of water.

Reliance is finally placed by the plaintiff upon the theory that even if technically no contract was reached between the parties the defendants are now estopped from claiming that there was no contract for the reason that, as it is contended, the defendants through Carl Ontai led the plaintiff to believe that she would have the water at the \$15 rate and stood by, in silence, with knowledge that she was erecting costly improvements upon the strength of that representation. No evidence, however, was adduced or offered upon which a finding of estoppel could be based. Had the question been left to the jury and had a finding of estoppel thereupon been made it would have been the duty of the court to set aside such finding for lack of evidence. Assuming for the purposes of this point that any representations were made as claimed by Ontai to Richards, there is no evidence that Richards relied upon such representations or was misled by them. Richards himself was a witness in the case and gave no testimony to the effect that he had been so misled or that he had in erecting the buildings relied upon anything said or done by Carl Ontai. On the contrary, as already appears in part from the quotations, his evidence was unqualifiedly to the effect that while in the days of planning and perhaps in the early days of the construction of the laundries he was doubtful as to the plaintiff's right under the lease to the water he convinced himself prior to August 31, 1907, that the water was the plaintiff's and that she was under no obligation to pay the Ontais for it. Upon

Richards v. Ontai, 19 Haw. 451.

the undisputed evidence, as well that given by Richards as that given by other witnesses in the case, the only finding possible upon this subject is that the erection of the buildings was not undertaken or completed in reliance upon any agreement or representation by the Ontais or any of them to furnish water for any specified length of time at a given rate or upon any other representation by them.

Under the terms of the lease and in the absence of any contract to the contrary the plaintiff is liable to the defendants for the reasonable value of any water taken by her for the laundries in excess of the quantity required for the excepted buildings and grounds as they existed at the date of the lease. The trial judge instructed the jury to award the defendants compensation for any water so used in the laundries during the period named in the set-off in excess of that to which the park itself was entitled. This was not error because there was undisputed evidence to support a finding that during the whole period named in the set-off the excepted premises other than the park had been using all of the water which it customarily used and which it required. Carl Ontai testified to the number, size and use of the pipes leading from the artesian well at the date of the lease including a statement that a certain pipe which he described at that time was laid to and supplied all the property known as the Camp, and consisting of the swimming tank, Hale Aloha, Kindergarten Building, Poepoe Cottage and Dispensary, and further testified that at the date of the trial the same arrangement of pipes leading from the well and supplying the excepted premises just mentioned still existed. This was sufficient to justify the inference by the jury that water flowed through such pipes during all of that period and that the excepted premises other than the park received the required supply of water. The supply, then, received by the excepted premises other than the park during that period being of the required quantity and constant, it was correct to give the jury the instruction above mentioned.

Richards v. Ontai, 19 Haw. 451.

Plaintiff's declaration was filed April 20, 1908, and the set-off on May 23, 1908. Under the instructions of the court the allowance of water rates to the defendants was for the period of six months ending July 1, 1908, such instruction having been given on the theory that the evidence justified a finding that it was the custom of the country that water rates be paid for a period of six months in advance. The only evidence on this subject was that payments of water rates to the government of this Territory are paid in advance once every six months, and that one of the witnesses once paid to an individual named Young similarly in advance. This evidence is insufficient in law to support a finding of a custom such as is contemplated by the rule invoked by the trial court. The payments to the Territory were made in pursuance of a statute requiring semi-annual payments. It is obvious from the record that the jury arrived at its verdict of \$246.50 in favor of the defendants by finding that the water used in the laundries was of the value of \$80 per room per year and that the water required for the park in the condition in which it was at the date of the lease was \$17 a year, both of these being valuations amply supported by the evidence. How much of the amount awarded the defendants was awarded for the period following the date of the filing of the declaration is susceptible of computation.

Such of the remaining exceptions as were not abandoned and are not herein otherwise disposed of need not be referred to in detail. We find no error in the rulings to which they relate.

The exceptions to the rulings and instructions on the subject of the custom referred to are well taken and a new trial will be ordered unless the defendants shall within five days from this date remit the amount which under this opinion was erroneously included in the verdict.

E. C. Peters and *A. Lewis, Jr.* (*Smith & Lewis* on the brief) for plaintiff.

J. A. Magoon for defendants.

Vivas v. Kauhimahu, 19 Haw. 463.

J. M. VIVAS AND A. G. CORREA v. MOSES KAUHIMAHU, J. H. FISHER, AUDITOR OF THE TERRITORY OF HAWAII, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE, WAILUKU.

SUBMITTED MAY 17, 1909.

DECIDED MAY 27, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

HUSBAND AND WIFE—*attorney's fee for defending wife in divorce suit.*

The husband is not liable at law for the fee of an attorney in defending the wife in a libel for divorce.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiffs sued to recover \$100 on a quantum meruit for their professional services to the defendant's wife as her attorneys on her appeal to this court from a decree of divorce granted to the defendant, and in drawing and preparing briefs, typewriting and attendance in the matter, averring that the services were necessary for protecting and defending her rights. The defendant's demurrer on the grounds that the complaint did not state a cause of action and showed that the court had no jurisdiction was sustained on both grounds. The plaintiffs appeal on the points of law involved in sustaining the demurrer.

The appellants in their brief say that they moved the judge who granted the divorce to grant them counsel fees and that he overruled their motion claiming that he had not jurisdiction to grant it. As the defendant contends, this might make the matter *res judicata*, but as the fact does not appear in the record it is not considered.

The demurrer was properly sustained. There is nothing in the complaint which shows that in attending to the appeal the plaintiffs gave credit to the husband or that the wife had not means of her own to pay for their services or that she requested

Vivas v. Kauhlmahu, 19 Haw. 463.

them to represent her on appeal. The court in which the libel is brought has discretionary power to require the husband to furnish means to engage counsel for the wife in defending a libel suit for divorce when "it shall be made to appear to the judge after the filing of the libel" that the wife is in "destitute circumstances." Sec. 2236 R. L. A refusal of a judge to compel the husband to advance counsel fees as one of the "reasonable expenses of trial to be incurred by the wife" would not be reversible on appeal unless it was shown that the refusal was arbitrary, nor would such refusal justify another court in taking jurisdiction of an action by counsel to recover for services rendered unless on the theory that counsel had a right to require the husband's payment for his services, whatever the wife's pecuniary or other circumstances might be.

An attorney then has no absolute right under any circumstances to an order of court to compel the husband to pay him a fee since it is within the reasonable discretion of the court to determine the necessity of engaging counsel. A case may occur in which it is so clear that a divorce ought to be granted or refused that the court would not consider that an attorney was needed. In other words, it is for the court and not the attorney to determine in a divorce suit whether his services are necessary to the wife's defense or not. It follows that if without order for payment of his fee by the husband he takes upon himself to defend, he has no right to look to the husband for compensation since it was the judge who tried the libel, and not counsel nor the wife, who is to pass upon the occasion for legal services, subject of course to reversion on appeal from a refusal of the court. Legal services in defending a libel are not, like such things as food, clothing and shelter, a necessary per se, the occasion for them being for the court to determine. "In England the practice of providing means for the wife in a pending divorce by or against her husband has been managed by interlocutory orders in the ecclesiastical courts and a temporary

Vivas v. Kauhimahu, 19 Haw. 463.

taxation of costs pending the suit for taxable costs only." Per Shaw, C. J., in *Coffin v. Dunham*, 8 Cush. 405, holding that the husband was not liable in an action by a counselor at law to recover for his services in defending the defendant's wife against a libel for divorce in which the wife prevailed.

The remedy at law for neglect of the husband's duty to support his wife "is for the wife to purchase necessities on her husband's credit and then for those who furnish such necessities to sue the husband for their reasonable value." *Dole v. Gear*, 14 Haw. 554, 556. "Where the husband and wife are living separate and apart one furnishes necessities to the wife at his peril and must show, among other things, in order to recover, that the wife was in need of the necessities, that the husband failed to supply her with them and that she had authority to bind her husband, that is, that she was justified in living apart from her husband." *Forrester v. Hurtt*, 18 Haw. 215, 216. The plaintiffs' complaint contains no such averments which are essential to a right of action. *Brown v. Ackroyd*, 34 Eng. L. & E. 214, 217, lays down the rule that "a wife has authority to pledge her husband's credit for the costs of the divorce suit where there are reasonable as well as where there are absolute grounds for instituting the suit," and "that the proctor suing the husband must prove a reasonable cause for instituting the suit, otherwise it would be illusory to say that the wife may, under such circumstances, apply to the Ecclesiastical Court for protection." The court, however, held that there was not reasonable cause for instituting the suit. *Morris v. Palmer*, 39 N. H. 123, holds on the contrary that the husband is liable for necessary costs in a prosecution against him upon complaint of the wife for a breach of the peace, placing the case on the same basis as a divorce suit. In *Gossett v. Patten*, 23 Kan. 240, a divorce suit in which the wife was charged with acts derogatory to her character and it was necessary for her in order to protect her good name to

Vivas v. Kauhimahu, 19 Haw. 463.

employ counsel to defend her and she had no means to pay and applied to the court for suit money, but before the court decided on the application the husband discontinued the suit, it was held that counsel could recover for services necessarily rendered in defending the case, but "where the services are unnecessary or where the wife is able to pay for them or where the allowance has been made for them and probably where the wife is in the wrong such an action could not be maintained." "In a husband's libel for the divorce charging the wife with adultery he is liable for services rendered by an attorney at law in establishing the innocence of the wife upon an implied promise to pay therefor as necessities for the wife" (*Porter & Moir v. Briggs*, 38 Ia. 166), but *Johnson v. Williams*, 3 G. Greene, 99, held that the husband was not liable for professional services in procuring the wife's divorce unless he authorized them or was ordered by the court to pay for them. A husband is liable for the fee of an attorney employed by the wife to defend her against a prosecution by the husband to compel her to find sureties to keep the peace "on a groundless charge." *Warner v. Heiden*, 28 Wis. 517. In *Shelton v. Pendleton*, 18 Conn. 417, the wife obtained a divorce, the plaintiffs suing the husband for disbursements and fees. The court said that the demand "has no support from any precedent to be found by us in this country or elsewhere," and that the uniform practice, in case of her inability to engage counsel, was for the court to order the husband to provide funds for her defense.

An attorney's fees will not be taxed in a divorce suit. "The authority of the court over the allowances for the wife's expenses of the suit excepts such cases from the operation of the general rule." *Gertz v. Gertz*, 5 Haw. 175. Legal services in defending a wife upon her retainer in criminal actions against her for desertion of her husband are not necessities for which an action quantum meruit lies. "To allow a suit on the quantum meruit in such a case would be a dangerous rule leading

Vivas v. Kaubimahu, 19 Haw. 463.

to much petty litigation. Application for allowance of legal fees and the amount of them ought to be addressed to the discretion of the court in an action for divorce or separation." *Kekoa v. Borden*, Ib. 23. The rule laid down in *Coffin v. Dunham*, supra, under facts similar to those in the present case, conforms to our decisions and practice in giving exclusive jurisdiction to the court in which the libel is pending to determine the propriety and reasonableness of attorneys' fees in defending the wife. In the absence of an express engagement or agreement by the husband his marital obligations do not imply a legal obligation on his part to pay for the legal services.

Judgment affirmed.

J. M. Vivas and *A. G. Correa* for plaintiffs.

Atkinson & Quarles for defendant.

No. 58. L. L. McCANDLESS v. T. F. LANSING, W. R. CASTLE, TRUSTEE, AND JAMES B. CASTLE. Reserved Question from Circuit Court, First Circuit. Submitted May 26, 1909. Decided May 27, 1909. Hartwell, C.J., Wilder and Perry, J.J. This was an action to quiet title in land. The presiding judge at the trial, after directing a verdict which the defendants claimed to be contrary to law, reserved for the consideration of this court the question "whether the verdict is contrary to law" upon the statement of facts submitted. Per curiam. "Whenever any question of law shall arise in any trial or other proceeding before a circuit court, the presiding judge may reserve the same for the consideration of the supreme court." Sec. 1862 R. L. No question is presented which the judge had not ruled upon. The statute does not authorize this court in answering reserved questions to order such judgment "as is fit and proper for the further disposition of the case" (Mass.

McCandless v. Lansing, 19 Haw. 467.

Pub. St. p. 832), nor, as in cases of exceptions, to vacate a judgment and require such further proceedings "as to law and justice shall appertain." Sec. 1867 R. L. The circuit judge is advised that no question is presented which this court can consider.

A. G. M. Robertson for plaintiff.

Castle & Withington for defendants.

MARIE K. HUMPHREYS *v.* MANUEL MELLO AND
THOMAS P. CUMMINS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MAY 14, 1909.

DECIDED MAY 29, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

HIGHWAYS—*ownership of fee.*

In the absence of any showing to the contrary, land taken in 1902 and thereafter used as a public highway is presumed to be owned by the Territory in fee simple.

HIGHWAYS—*statute as to trees in.*

R. L. Sec. 636, which limits the amount of damages to be recovered for injury to trees in the public highways, is constitutional.

OPINION OF THE COURT BY WILDER, J.

This is an action by plaintiff, the owner of a lot on Nuuanu Avenue, Honolulu, for damages resulting from cutting and mutilating, at the instance of defendants representing the county of Oahu, a shade and ornamental tree growing on the sidewalk in front of her lot with the permission of the superintendent of public works. The circuit court, jury waived, gave judgment for plaintiff for \$5, all evidence tending to show

Humphreys v. Mello, 19 Haw. 468.

the actual damages having been excluded, pursuant to R. L. Sec. 636 which reads as follows:

“Any person injuring the trees in front of the premises of any owner or occupant without permission of the owner or occupant shall be liable to the owner or occupant in the sum of five dollars for each tree so injured, to be recovered in an action of trespass; provided, that this shall not apply to the trimming and removal of trees by authority of proper officers of the Territory for public purposes and uses.”

On the exceptions brought by plaintiff, it not appearing that defendants took any exceptions, it is contended that the statute does not attempt to limit the amount of damages which may be recovered to \$5 without reference to the damages actually sustained, that if it does, it is unconstitutional in depriving her of her property without due process of law, and, incidentally, that it does not appear that the Territory owns the highway in fee.

At the time of the acts complained of the tree was growing on a public highway. Our statute provides that “The ownership of all public highways and the land, real estate and property of the same shall be in the Territory in fee simple.” R. L. Sec. 593. See also R. L. Secs. 700, 722. The only evidence on the point is that prior to 1902 the tree grew in plaintiff’s yard and that since then it has been maintained and cared for by her on the public highway with the consent of the superintendent of public works. While it is true that the “Territory cannot acquire the fee in the public highway by a mere legislative enactment” (*In re Trust Co., Ltd.*, 17 Haw. 523, 524), still it is to be inferred, in the absence of any showing to the contrary, that the Territory has acquired the fee of land taken and used for a public highway since the enactment (in 1892) of the statute referred to.

The right of action given by the statute is one to recover \$5 for each tree injured. It is clear, we think, that the statute does attempt to limit the amount of damages to be recovered.

Humphreys v. Mello, 19 Haw. 468.

This brings us, then, to the constitutionality of the statute. If the abutting land owner has no right to plant or maintain trees on the public highways, when such a right is conferred by the legislature it may at the same time be made subject to conditions. In this Territory such right is given by R. L. Secs. 624 and 635 and in case of injury to such trees so planted and maintained civil and criminal remedies are provided, but in the civil action the amount of damages to be recovered is limited. R. L. Secs. 636, 637. Plaintiff claims the right to plant and maintain this tree in the public highway under the permission authorized to be given by the statute. Without the statute she would have no such right. The statute then which gives her the right to maintain trees in the highway at the same time limits the amount of damages which she may recover for an injury to such trees. How then may she be heard to complain? If without the authority of the statute she has no right to maintain trees in the highway, then when the statute does give that right it may properly limit the amount of damages to be recovered in an action for injury to such trees, the same as is frequently done in statutes allowing actions for causing death.

We are referred to the case of *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, in which it was held that an owner of land abutting on a street, the fee being assumed to be in the municipality, could recover for the destruction of trees in front of his lot caused by the defendant in negligently permitting gas to escape from its pipes under the highway. The opinion in that case by a bare majority of the court is not without force. The reasoning is that the right of the abutting owner to maintain trees in front of his lot is in the same class as his right to light, air and access to and from the street, and that consequently he is entitled to recover as much for an invasion of the one as of the other. Assuming the facts to be the same as in the case at bar, we cannot, however, adopt the conclusions stated.

Humphreys v. Mello, 19 Haw. 468.

While agreeing with counsel for plaintiff that the planting and maintaining of trees along highways by abutting owners is to be encouraged, especially in this Territory, still that is a matter that this court cannot take into consideration in determining the constitutionality of the statute in question.

Exceptions overruled.

A. S. Humphreys for plaintiff.

Cathcart & Milverton for defendants.

No. 73. KAHOPEWAI MIA (W), KALAAUPA (W), SARAH O. JACOBS, EMMA K. KAUPALOLO, SAMUEL KAAIMOKU, AND WILLIAM KAAIMOKU, MILEKA KAAIMOKU, MARY K. KAAIMOKU AND DORA K. KAAIMOKU, MINORS, BY THEIR GUARDIAN EDMUND H. HART, v. J. E. KĒKIPI. Motion to Dismiss Appeal. Argued June 1, 1909. Decided June 1, 1909. Hartwell, C.J., Wilder and Perry, J.J. The plaintiffs move to dismiss the defendant's appeal for want of prosecution. The appeal was taken November 9, 1908, the appeal bond filed November 17. An affidavit of the circuit court clerk was filed with the motion alleging that no request or order for a transcript had been made. The defendant filed an affidavit of the stenographer that shortly after the case was tried one of the defendant's attorneys asked for an estimate of the cost of the transcript which he informed him would be about \$25, that in the latter part of January he sent to the attorney an order to be signed by the presiding judge and the attorney replied that Judge Robinson was the one to sign it and that the stenographer might go to him about it, but to the best of the stenographer's memory did not request him to do so. At the time set for hearing the motion the defendant's attorney filed the transcript. Per curiam. The motion is granted. Under Rule 1 the appeal is dismissed. There are no papers

Mia v. Kekipi, 19 Haw. 471.

filed here excepting the transcript which is ordered to be struck from the files. No excuse is presented for the six months' delay in preparing the transcript or filing the other necessary papers.

E. A. Douthitt for plaintiffs.

M. F. Prosser for defendant.

BECKY L. K. KALAMAKEE BY HER GUARDIAN
J. W. WAILEHUA KEIKI v. HENRY WHARTON
AND WAIALUA AGRICULTURAL CO., LTD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 21, 1909.

DECIDED JUNE 3, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

APPEAL AND ERROR—*exceptions—transcript.*

A transcript of evidence not made a part of a bill of exceptions by reference or otherwise, cannot be considered.

Id.—Amendment of bill of exceptions.

A continuance in this court for the purpose of applying to the trial court for an amendment of a bill of exceptions will not be granted in the absence of a showing of grounds for the amendment.

Id.—Burden of sustaining error.

The burden of sustaining allegations of error is upon the appellant. Exceptions for the determination of which a transcript is necessary must, in its absence, be overruled.

OPINION OF THE COURT BY PERRY, J.

This is an action to quiet title, instituted in January, 1900. On exceptions from the first trial this court in November, 1904, set aside a verdict for plaintiff, holding that upon the

Kalamakee v. Wharton, 19 Haw. 472.

undisputed evidence of adverse possession a verdict should have been directed for the defendants, and ordered a new trial. At the second trial had in January, 1906, the court, evidently regarding the evidence as being practically the same as that adduced at the first trial, directed a verdict for the defendants. Plaintiff excepts.

The bill of exceptions, although filed in February, 1906, was not allowed until March 2, 1909. Attached to the bill is a "transcript of portion of the testimony" but in the bill itself no reference is made to that or any other transcript making the same a part of the bill. Under these circumstances the alleged transcript cannot be considered by this court. It is not a part of the bill of exceptions. *Territory v. Ah Moon*, 14 Haw. 203, 204. See also *Keliilihune v. Vierra*, 13 Haw. 28, 29, 30.

Following *Magoon v. Ahmi*, 11 Haw. 233, 234, leave was by this court, since the argument of the exceptions, granted to the plaintiff to file a motion for a continuance to enable her to apply to the circuit court for permission to amend the bill by making proper reference therein to the transcript, the plaintiff being by the order granting leave required to make a prima facie showing of grounds for asking the desired amendment. A motion for a continuance was filed, the only statement of grounds for the amendment being that contained in an affidavit by J. A. Magoon, the plaintiff's present attorney, to the effect that the omission of reference in the bill to the transcript and excerpts was "by an oversight." In answer to this court at the hearing of the motion Mr. Magoon added that the bill of exceptions was prepared and presented not by himself but by another attorney. It is obvious that Mr. Magoon cannot testify that the attorney who prepared and presented the bill omitted by oversight the reference to the transcript. The statement in the affidavit can refer only to Mr. Magoon's personal connection with the matter. A prima facie showing such as would

Kalamakee v. Wharton, 19 Haw. 472.

justify the trial court in granting the desired amendment has not been made. The motion for a continuance is denied.

The bill contains nine exceptions. Nos. 8, 9 and 10 are respectively to the direction of the verdict, to the verdict and to the overruling of the motion for a new trial. The burden is upon the appellant to sustain her allegations of error. Without a transcript of the material evidence it is impossible for us to say that the verdict or the rulings just referred to were erroneous as a matter of law. The same is true of exceptions numbered 1 and 2 to the disallowance of certain questions on the ground that they were "not proper cross-examination;" of No. 4 to the disallowance of a question on the ground that it was "not proper redirect;" and of No. 3 to the exclusion of certain proposed evidence on the ground that it was immaterial. Nos. 5 and 7 have been expressly abandoned.

The exceptions are overruled.

J. A. Magoon for plaintiff.

Castle & Withington and *C. W. Ashford* for defendants.

L. L. McCANDLESS v. T. F. LANSING, W. R. CASTLE,
TRUSTEE, AND JAMES B. CASTLE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 17, 1909.

DECIDED JUNE 5, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

INFANTS—*disaffirmance of deed*.

On the undisputed facts it is held as a matter of law that mere silence for two years and ten months after majority did not prevent an Hawaiian girl from disaffirming her deed made when

McCandless v. Lansing, 19 Haw. 474.

fifteen years of age, and that she was not estopped from so doing by a foreclosure sale of the land during her minority.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action to quiet title in 1.48 acres of land at Waiahole, Oahu, described in R. P. No. 2445. The heirs of the patentee were his two sons, the elder of whom died without issue, his share descending equally to his widow and younger brother who then owned three undivided fourths which upon his death descended to his daughter Malaea subject to the widow's dower. The plaintiff, at some date not stated, purchased the one undivided fourth share which had descended to the widow of the elder brother, concerning which share there is no controversy. October 19, 1898, Kalua, the younger brother's widow, conveyed for \$60 her dower right in the three-fourths interest of which her husband died seized to the defendant Lansing who conveyed the same to the defendant James B. Castle. September 18, 1901, Malaea conveyed to Lansing for \$80 all "her right, title, interest, possession, claim and demand whatsoever, as well in law as in equity, of, in and to" the land, the interest conveyed being stated as "all of my interest in the estate of my father Kekauhooulu," her deed containing covenants of warranty and describing herself as "unmarried, now of age having been born on the 17th day of June, A. D. 1881." April 22, 1907, Malaea, in consideration of \$100, her husband James Watson consenting, quitclaimed to the plaintiff all her right, title, interest, claim and demand in the same land. The deeds were recorded. The court instructed the jury to find for the plaintiff subject to the dower interest held by the defendant James B. Castle. The defendants excepted to the direction and verdict as against law and the evidence and to the refusal of the court to instruct the jury to find for the plaintiff for only one-fourth of the land and in favor of the defendant James B. Castle for three-fourths. It was shown conclusively at the trial

McCandless v. Lansing, 19 Haw. 474.

that Malaea was born in the year 1886. It was shown by the defendants' exhibits that upon foreclosure by public sale of a mortgage made by Lansing dated August 12, 1897, Bonny, trustee, became the purchaser May 14, 1904, and that the land purchased at the sale included that which is described in R. P. 2445. Since Lansing had not acquired the property at the date of his mortgage it may be inferred that it was given later as additional security. It further was shown that May 14, 1904, Bonny conveyed to W. R. Castle the property sold on foreclosure. The deed from Bonny to W. R. Castle dated May 14, 1904, was acknowledged December 24, 1904, and recorded March 1, 1905. James B. Castle leased the land to Lansing December 20, 1905, for a term ending December 31, 1907, at an annual rental of \$1080. The lease is not recorded nor does it appear how the title went from W. R. Castle to J. B. Castle. June 10, 1907, McCandless leased the land to C. Hing Wai Co. for the term of twenty-one months from April 1, 1907, at an annual rental of \$25, the lease being recorded June 12, 1907.

The defendants claimed in the trial court and in argument on the exceptions that Malaea failed to disaffirm her deed to Lansing within a reasonable time after coming of age and that when she quitclaimed to the plaintiff April 22, 1907, there had been such changes in the condition of parties, particularly in the purchase by James B. Castle, that it was inequitable to allow her to disaffirm and that under all the circumstances her deed to McCandless did not constitute a disaffirmance.

The defendants also contend that unless the court had held in their favor the question should have been left to the jury whether the grantor's acquiescence in the sale of the property by her grantee, the public foreclosure sale, change of title and recorded declaration of minority was to be inferred; but as all the facts are shown by clear and undisputed evidence their legal effect was for the court and not the jury to determine. *Peabody*

McCandless v. Lansing, 19 Haw. 474.

v. Damon, 16 Haw. 447, 451. In such cases "what constitutes a reasonable time is a question of law." *Oil Co. v. Van Etten*, 107 U. S. 325, 334. That the quitclaim deed was a clear indication of the grantor's intention to repudiate her earlier deed is plain. *Kekai v. Limalau*, 16 Haw. 464, 465, held that an action of ejectment by an infant's heirs was a sufficient disaffirmance on their part of a lease made by the infant, *Tucker v. Moreland*, 10 Pet. 72, being cited with approval, in which case the court said, "We do not mean to say that in all cases the act of disaffirmance should be of the same or of as high and solemn a nature as the original act; for a deed may be avoided by a plea." The grantor is not presumed to have made her deed by mistake as to the interest conveyed or to have forgotten that she had conveyed it; on the contrary she is presumed to have intended the clear consequences of her act and to have intended to repudiate the earlier deed.

There is no estoppel resulting from the publication of the notice of foreclosure or in the recording of the affidavit of foreclosure and the deeds. A minor is not subject to be estopped even if shown to have known of the notice of foreclosure sale and affidavit, all of which occurred before she came of age. She would not, as in case of a subsequent purchaser, be legally affected by the record of the deeds.

The only question then is whether, taking the second deed to be a disaffirmance of the earlier, it was unreasonably delayed after the grantor came of age. The delay in this case, as agreed by counsel, was two years and ten months. It is impossible to fix any definite time as reasonable. Expenditures incurred by the grantee or his assigns, if known by the grantor, may estop his ever asserting his claim or he may be estopped by waiting so long as to lull the grantee into a sense of security. If the grantor had been a boy instead of a girl his time for disaffirming would not have begun for two years later. Probably the mother induced the girl to make the deed and took the purchase

McCandless v. Lansing, 19 Haw. 474.

money for herself and it was not until she married and was informed of her right that she exercised it. The unusual fact is that her deed stated the date of her birth, making her out to be about twenty instead of fifteen years of age, a statement which could hardly have misled any observing person. The protection which the law gives to a minor allows him after he comes of age time to obtain independent advice, which the minor could not legally contract for, and to make such examination as to satisfy himself whether he would do better by letting the transaction stand or repudiating it. The time would vary with mental capacity, bodily conditions, recentness or remoteness of the transaction, the time when the salable value was ascertained and many other conditions. A bright person would find out his interest sooner than a dull person would do. If the minor was deceived the effect of the deceit or misrepresentation would remain until the truth is shown. Here the only facts that appear are that the grantor was a girl about fifteen years of age; that her father was not living; that her mother had sold her dower to the same grantee; that the minor's deed misrepresented her age by about five years; that about two years and ten months after coming of age, having meantime become married, she conveyed the land, by her husband's consent, to the plaintiff.

The variety in the decisions concerning the time considered as reasonable for disaffirming a minor's deed is partly explained by the varied circumstances, and perhaps to some extent is influenced by the different views of courts concerning the policy of protecting minors against undue influence, imposition, and their own improvidence on the one hand, and on the other hand of securing titles obtained without knowledge or means of learning that the grantor was under age. Thus three years were held to be a reasonable time in *O'Dell v. Rogers*, 44 Wis. 136, while in *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, three and one-half years were held to be an unreasonable time. We are aware of no case in which mere silence for two years and

McCandless v. Lansing, 19 Haw. 474.

ten months has been held to be sufficient to preclude a disaffirmance. Under the circumstances, and especially in view of the fact that the grantor was a Hawaiian girl, the disaffirmance was within a reasonable time.

Exceptions overruled.

A. G. M. Robertson for plaintiff.

D. L. Withington and *W. A. Greenwell* (*Castle & Withington* on the brief) for defendants.

DISSENTING OPINION OF PERRY, J.

While concurring in the foregoing opinion in so far as it is there held that the quitclaim deed was a sufficient act of disaffirmance, that the defendant's claim of estoppel against Malaea cannot upon the undisputed facts be supported, and that when, as in the case at bar, the facts are undisputed the question of whether the time within which disaffirmance is attempted is reasonable or unreasonable is for the court to determine. I feel compelled to dissent from the view that the disaffirmance by Malaea was within a reasonable time. To the circumstances of the case at bar recited in the majority opinion may be added the fact that, as the evidence would have justified the jury in finding, during the period from the date of the first to the date of the second deed Malaea, a Hawaiian by birth, lived at Kaha-luu, and, perhaps, at Wailau in the district of Koolaupoko and in Honolulu, all on the island of Oahu,—thus distinguishing to some extent this case from those, like *O'Dell v. Rogers*, 44 Wis. 136, in which the disaffirming grantor had resided most of the time after reaching majority in a state other than that in which the land conveyed was situated. The case at bar is one of mere inertness or silence, continued for two years and ten months.

In view of my conclusion that the act of disaffirmance was not within a reasonable time, it becomes necessary for me to consider what length of time is permitted by the law to a grantor

McCandless v. Lansing, 19 Haw. 474.

to elect whether or not to disaffirm, a subject not touched upon in the prevailing opinion.

It is now undoubted that the deed of a minor is voidable and not void and that it may, after he becomes of age, be either ratified by him by his acts or by his failure to act under circumstances which would require action on his part, or disaffirmed by him, but the authorities are in conflict as to the time within which such disaffirmance may take place. Some hold that the grantor may disaffirm at any time within the period prescribed by the statute of limitations relating to real actions and others that he must do so, if at all, within a reasonable time after attaining the age of legal majority. Those favoring the former rule either assert it without giving any reasons or, when reasoning is given, it is either that by analogy the minor should have the same length of time in this class of cases as would be permitted in other cases where the recovery of land is sought, or that the statutes of limitations relating to real actions apply to this class of cases. Neither reason suggested in favor of the statutory period rule appeals to me as sound. The statute permits a recovery, if at all, within the prescribed period from the time *when the right of action first accrued*. The deed of the minor being voidable passes the title and the latter remains in the grantee until something sufficient in law for the purpose happens to divest the grantee of it and to revest it in the grantor. That something, it is clear, must be a valid disaffirmance. Nothing short of it will suffice. Until disaffirmance there is no title and therefore no right of action in the grantor. The mere coming of age does not alter the situation as to the title. Unless the minor acts the title still continues, in the grantee. If the statute of limitation applies at all, it must apply from the date of the deed, from the date of majority, from the date of suit, or from the date of some other act of disaffirmance after majority. Certainly it cannot be contended with any force that it runs from the date of the deed,

McCandless v. Lansing, 19 Haw. 474.

and, as already suggested, the mere arrival at majority does not change the state of the title. Nor can it be held to run from the date of the suit for then it would be in the power of a grantor to postpone the bringing of the action indefinitely and this, of course, the law cannot tolerate. There must be some known limit of time for action not wholly within the power of the grantor to fix. To say that the statute runs from the date of disaffirmance would still leave the question unsolved as to when disaffirmance must take place and that, too, irrespective of whether or not the institution of an action is in itself a sufficient disaffirmance.

I think that the correct rule is that disaffirmance must be had within a reasonable time after the minor reaches majority. The purpose of the law in allowing time is to protect minors from their ignorance and improvidence, but the grantee is nevertheless entitled to some consideration (Devlin on Deeds, Sec. 91). not more than is fairly consistent with due protection to the interests of the minor. *Goodnow v. Empire Mining Co.*, 31 Minn. 468. The desirability of certainty and stability in titles is deserving of some weight. As a learned judge once said in a similar case, "the world must move." The grantor once given a period of time within reason for the making of his choice between ratification and revocation of his act done in minority must permit titles to become settled and business to proceed.

It may be said, however, that in *Irvine v. Irvine*, 9 Wall. 617, 627, and in *Sims v. Everhardt*, 102 U. S. 311, 312, the supreme court of the United States has expressly decided that the better rule is that concerning the statutory period. In the first of these cases the only remark of the appellate court was that an instruction of the trial court in effect laying down the statutory period rule "was all that the plaintiff had a right to demand." This is not necessarily a statement to the effect that the plaintiff had a right to demand as much; and yet it is

McCandless v. Lansing, 19 Haw. 474.

true that in the *Sims* case the court said, "such was in effect the ruling" in the Irving case. In the *Sims* case it is not entirely clear how far the court intended to rely for its actual decision upon what it said upon the subject of the two rules. It may be that it intended to base its conclusion on the ground that the full statutory period of limitations had not run against the grantor (not more than two months had elapsed) as well as upon the ground that the disaffirmance had been in view of the circumstances of that particular case within a reasonable time; and yet in *MacGreal v. Taylor*, 167 U. S. 688, 697, the court, referring to the *Sims* case, said that it had "reversed the decree, holding that, under the peculiar circumstances of the case, including the fact that Mrs. Sims labored under the disability of coverture when she made the deed, her disaffirmance of it was within a reasonable time, and that she was entitled to the decree asked." No reference was made in the later case to any other or different holding in the *Sims* case.

Assuming, however, that these United States Supreme Court cases, or either of them, contain an adjudication by that tribunal in favor of the statutory period rule, still this court may now, notwithstanding the amendment of March 3, 1905, concerning appeals to the federal supreme court, follow any decision to the contrary previously rendered by the courts of Hawaii. *Rubenstein v. Hackfeld & Co.*, 18 Haw. 126. Such a decision is to be found in *Kahanu v. Thompson*, 1 Haw. 421 (1856). In that case Chief Justice Lee of the supreme court of Hawaii, acting under a system which permitted the justices of the supreme court to preside at jury trials, charged the jury, amongst other things, that "when a minor purchases land he must make his election within a reasonable time after reaching his majority whether he will keep the land and pay for it or disaffirm the contract and return the land." This was necessarily a rejection of the statutory period rule. (Not more than three years had elapsed after majority). It is true that in the

McCandless v. Lansing, 19 Haw. 474.

Kahanu case the question arose with reference to a deed to the minor and not from him, but this difference in fact carries with it no distinction in principle. The principle is, and it applies in the one case as well as in the other, that, with certain exceptions not now material, the contracts of a minor are voidable and not void and may be disaffirmed by him after coming of age. No reason occurs to me requiring or justifying the application of one of the two rules under consideration to cases of deeds to a minor and the other rule to cases of deeds from a minor. In each class of cases the object is to secure protection to the minor and at the same time not to unnecessarily impede the course of commerce or embarrass titles. It does not appear whether at the time of the charging of the jury by Chief Justice Lee any other justice or justices of the supreme court were with him on the bench, a practice sometimes followed in those days. However that may be, the chief justice's charge sufficiently shows what the law on the subject was deemed to be in Hawaii at that time. Chief Justice Lee's ruling was not appealed from or questioned and no subsequent decision in Hawaii holds to the contrary. On the subject of the effect of an old Hawaiian decision see *Keakaouha v. Schooner Robert Lewers*, 1 Estee 75; 114 Fed. 849. It may not be out of place to refer to the cases of *Thurston v. Bishop*, 7 Haw. 421, 437, and *Estate of Kealiahonui*, 8 Haw. 93, 99. In the first of these the court held that it was the duty of a person whose claim had been denied by the Land Commission during his infancy "to assert his claim to this land within a reasonable time after his coming to full age," and in the second that "in any case of improper action by a *prochein ami*, where the infant might obtain relief, the application to the court must be made by the infant promptly on becoming of age, otherwise the infant's silence will amount to an affirmance." The principle there involved is not precisely the same but it is closely related to that involved in the case at bar. In *Nawahi v. Hakalau Plantation Co.*, 14 Haw. 460, where

McCandless v. Lansing, 19 Haw. 474.

a lease of a minor's land had been made to the defendant by the guardian, the court held that while the lessee was absolutely bound by the lease the ward or landlord might or might not at his option terminate the lease "on arriving at majority." While nothing further is said on the subject now under consideration the inference, if any, would seem to be that such option must be exercised promptly after reaching majority.

In my opinion the delay of two years and ten months was under the circumstances disclosed by the evidence, and with nothing to explain or excuse it, unreasonable, a verdict should not have been directed for the plaintiff and a new trial should now be granted.

IN THE MATTER OF THE PETITION OF J. B.
CASTLE.

RESERVED QUESTION FROM COURT OF LAND REGISTRATION.

ARGUED MAY 26, 1909.

DECIDED JUNE 5, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

ADVERSE POSSESSION—*land under lease—surrender.*

Land was leased in 1891 for fifteen years, the lessees going into possession. Since 1892 the land has been in the adverse possession of a third party. In 1897 a second lease was made for twenty years to different lessees to begin during that year. It is held that the statute of limitations started to run against the landlord at least in 1897 on the theory that the first lease was surrendered.

OPINION OF THE COURT BY WILDER, J.

The petitioner made application to the court of land registration for a registered title to a piece of land in Manoa Valley, Honolulu, containing about forty-eight acres, to nine-tenths of an acre of which Helen Boyd claimed title by adverse possession.

In re Castle, 19 Haw. 484.

From the undisputed facts it appears that petitioner's grantor on August 20, 1891, leased a part of the land, including that in dispute, to Ma Im and Leong Fong for fifteen years from September 1, 1891; that the tenants went into possession; that on May 17, 1897, the grantor leased the same premises to Ung Chew, Sun Tuck, Wong Hoy and Wong See for twenty years from September 1, 1897, at an annual rental of \$100; that since 1892 Helen Boyd has been in the adverse possession of that part claimed by her; and that the petitioner purchased the land from the lessor in 1905. The judge rendered a decision in effect granting the petition as to all the land except that part claimed by Helen Boyd, and denying it as to that part. The petitioner then contending that notwithstanding the decision he was entitled to a decree registering his title to all of the land, the judge reserved the following question for this court: Whether, notwithstanding the decision, the petitioner is entitled to a decree registering his title to all of the land?

The argument on behalf of the petitioner is that the statute of limitations could not begin to run against him until he had a right of entry and that he had no right of entry until the termination of the leases, and therefore that the statute has not even started to run yet.

The petitioner's grantor having leased the land in 1897 for a term to begin during the existence of the first lease made in 1891, it is to be inferred that in the absence of a showing to the contrary the first lease was surrendered and that on that theory the second lease was made. If in fact, as between the lessor and the lessees under the first lease, there was no surrender, that should have been shown. After the surrender of the first lease and before the granting of the second one there was a period when undoubtedly the owner of the fee had a right of entry sufficient to maintain an action to recover the land at that time in the adverse possession of a third party, and the statute of limitations, if it was not already running, then started

In re Castle, 19 Haw. 484.

to run, which was some time in 1897, so that more than ten years elapsed before the present proceedings were brought. It follows, therefore, that the petitioner is not entitled to a registered title to that part of the land claimed by Helen Boyd. It is unnecessary to say whether the statute of limitations would have started running against the landlord if there had been no surrender.

The reserved question is answered in the negative.

C. F. Peterson for J. B. Castle.

J. W. Cathcart (*F. W. Milverton* also on the brief) for Helen Boyd.

————— •

BESSIE R. BURNS *v.* JULIA H. AFONG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 8, 1909.

DECIDED JUNE 10, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

ESTOPPEL—*former judgment.*

In an equity suit the issue was whether a promise had been made with intent not to keep it and the decision, as construed by this court, was that no promise whatever had been made. The decree dismissing the bill, based on the decision, bars a subsequent action at law on the same promise.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action of assumpsit to recover \$10,000 upon the defendant's agreement to pay the plaintiff that sum for compromising a suit in equity brought by the plaintiff and others against the defendant for an accounting of the accumulations of a trust fund, her removal as trustee and the appointment of another in her place. A compromise was made pend-

Burns v. Afong, 19 Haw. 486.

ing the suit which the defendant pleaded in bar. The plaintiff Bessie R. Burns then filed a supplemental bill alleging that the compromise was secured by fraud, consisting among other things in the defendant's promise to pay her \$10,000 made with the intention not to keep it. The defendant filed her answer to the supplemental bill denying the promise. The court after hearing evidence sustained the plea in bar and made a decree dismissing the bill after giving the following decision:

"Although nearly two weeks have been consumed in the taking of evidence in support of the plea in bar, it does not seem necessary to the Court to take the case under advisement. It seems to the Court that it is simply a question of fact. The fact presented is, was there a compromise made and was it made without fraud or misrepresentation.

"The Court in passing upon the question acts in the nature of a jury instead of that of the Court. The question is, did Mrs. Afong promise Mrs. Burns a home or \$10,000, or anything, in consideration of her signing the compromise? From all the evidence in the case the Court is satisfied that Mrs. Burns entered into this compromise with her eyes open, and that she was aware of this compromise.

"The plea in bar is sustained."

The question presented by all the three exceptions taken by the defendant is whether the plaintiff is estopped by the decree, the court having overruled the defendant's plea that the decree finally adjudicated the issue of a promise. It is contended by the plaintiff that it is only by inference that it can be said that the court decided that there was no promise at all, a promise with an intention not to keep it being the fact in issue and not whether any promise was made. The defendant contends that the decision necessarily disposes of the fact of a promise, with whatever intention, for if there was no promise there could be no intention.

- Specifically the pleadings, besides the plea referred to, were as follows: The plaintiff demurred to the plea on the ground that the decree determined nothing in the equity suit except

Burns v. Afong, 19 Haw. 486.

that it was compromised without fraud or misrepresentation, but does not purport to determine the "separate collateral and inducing contract on which this plaintiff sues but an entirely different and separate agreement." The court overruled this demurrer and the plaintiff filed a replication admitting the equity suit and pleadings but denying that the promise to pay the plaintiff \$10,000 was an issue or that any allegation of a promise was made on the supplemental bill for any purpose other than by way of inducement to show fraud or that the court found that the promise had not been made, averring that the judge's decision referred to \$10,000 merely by way of recital with no adjudication as to the promise, and further that its reference to the promise is indefinite and not conclusive and that no adjudication of it was required or justified by any issue in the suit or that the decree was a final adjudication of the promise. The defendant demurred to the replication on the grounds that it admitted every material allegation of fact in the plea and set forth no affirmative or other matter in reply and that it denied those allegations only which were conclusions of law. The defendant excepted to the overruling of this demurrer and to the denial of her motion for judgment on the pleadings. The plea in bar was then submitted on the pleadings, the defendant excepting to the overruling of the plea.

When the case was called the plaintiff's attorney objected to Justice Perry sitting on the ground that he had acted as attorney in the equity suit. After the justice had stated what his connection with the case was the objection was overruled and the attorney was given leave to file his statement later. We find the facts to be in accordance with Justice Perry's statement which appears in the minutes. The fact is, clearly, that Justice Perry has not at any time acted, in this or in any other cause, as counsel for either of the parties to this suit and that his only connection with the equity suit was as attorney for certain other parties. No disqualification exists.

Burns v. Afong, 19 Haw. 486.

The plaintiff's demurrer to the plea was properly overruled and as no new showing was made by the replication the defendant's demurrer to it should have been sustained. The issue on the plea in the suit which was whether the compromise had been made without fraud or misrepresentation was adjudicated by sustaining the plea and dismissing the bill. The court could have made a specific finding of a promise made without fraudulent intent but the holding that none was made eliminated any supposition of a fraudulent promise.

After a hearing for two weeks on the plaintiff's claim that she was induced to compromise by the defendant's fraudulent promise to pay her \$10,000 the court did not hesitate to find, as we understand its decision, that she executed the compromise without fraud or misrepresentation or promise of anything and with her eyes open.

In the equity suit the material fact in issue was whether the compromise was obtained by the promise made with intent not to keep it. Both the promise and the fraudulent intent were necessary to be shown, failure of proof of either of these requiring dismissal of the bill. Two courses were open to the trial court, first, to find that there was no promise, when there could have been no intent not to keep it, and second to find or assume a promise and then find that the promise was made in good faith without intent not to keep it. The judge said: "It seems to the Court that it is simply a question of fact. The fact presented is, was there a compromise made and was it made without fraud or misrepresentation. * * * The question is, did Mrs. Afong promise Mrs. Burns a home or \$10,000 or anything in consideration of her signing the compromise? From all the evidence in the case the Court is satisfied that Mrs. Burns entered into this compromise with her eyes open and that she was aware of this compromise. The plea in bar is sustained." Had the court merely stated the broad question which it first stated, "was it made without fraud or misrepre-

Burns v. Afong, 19 Haw. 486.

sentation,” and then merely said, “the plea in bar is sustained,” which of the alternatives above suggested it adopted would have been open to doubt. The court, however, proceeded further and stated the precise question which it proposed to consider and decide, namely: “Did Mrs. Afong promise Mrs. Burns a home or \$10,000 or anything in consideration of her signing the compromise?” The rule that estoppels are not to be based upon matters that may be merely inferred from a judgment does not apply to inferences that are necessary. *H. C. & S. Co. v. W. S. Co.*, 14 Haw. 50, 55. As we read the decision, there is no room to infer that the court found or assumed a promise and then merely found a lack of fraudulent intent. Its statement of the precise question to be answered excludes the possibility of the inference and the language used was not apt or appropriate to express any such finding. The decision is an adjudication that the promise now declared on was not made and bars the present action.

The plaintiff’s demurrer to the plea was properly overruled and as no new showing was made by the replication the defendant’s demurrer to it and also the plea in bar itself should have been sustained and judgment for defendant entered.

Exceptions sustained.

C. F. Clemons (Thompson & Clemons on the brief) for plaintiff.

C. H. Olson (Holmes, Stanley & Olson on the brief) for defendant.

Lloyd v. Territory of Hawaii, 19 Haw. 491.

JAMES W. LLOYD v. TERRITORY OF HAWAII.

ORIGINAL.

ARGUED JUNE 9, 1909.

DECIDED JUNE 19, 1909.

HARTWELL, C. J., WILDER AND PERRY, JJ.

PLEADING—*action against Territory.*

In an action against the Territory on a contract made by certain officers of the house of representatives the petition should show that they had authority to make the same.

OPINION OF THE COURT BY WILDER, J.

This is an action against the Territory for \$279.90, the main allegations of plaintiff's petition being that at the regular session of the legislature this year he was elected by the house of representatives as its official stenographer; that from February 17, when it organized, until April 9, when he resigned, he performed the duties of such position for which he was allowed and paid \$10 a day; that on February 20 it was agreed between the plaintiff and the speaker of the house, the chairman of its committee on accounts and the chairman of its committee on printing that he should receive in addition to his salary a specified amount for all typewriting done by him; that during the time in question, at the request and under the direction of the speaker, he prepared in typewriting the minutes of the house, compiling the same from his stenographic notes, and made copies thereof, all of which were accepted and used by the house and its officers and committees; that under Rule 15 of the house the duties of the stenographer are prescribed, which include transcribing such portions of the proceedings as may be requested by any member; that he performed the duties as official stenographer as prescribed by the rule in question; that the chairman of the committee on accounts declared that he would be paid for all typewriting

Lloyd v. Territory of Hawaii, 19 Haw. 491.

of minutes; that at former sessions it has been the custom of the house to pay the official stenographer for typewriting the minutes and making copies thereof; and that the claim was disallowed by the committee on accounts and by the house. The defendant demurred to the petition on the grounds that no cause of action was stated and that consequently this court has no jurisdiction.

Plaintiff's claim is substantially for extra work done by him which he argues was in addition to and outside of the duties of the stenographer as prescribed by Rule 15 of the house which reads as follows: "It shall be the duty of the stenographer to record in full in shorthand all proceedings of the house, rulings of the chair, and debates, and he shall transcribe such portions thereof that he may from time to time be requested by any member."

It is argued on behalf of defendant that the services in question rendered by plaintiff were under the rule quoted a part of his duties for which he was paid and allowed \$10 a day, but if not then that the petition does not disclose that the agreement for extra compensation made by the speaker and the chairmen of the two committees was one which they were authorized to make, citing R. L. Sec. 2000, necessitating the sustaining of the demurrer. That part of the section which is material reads as follows: "The supreme court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury. First. All claims against the Territory founded * * * upon any contract, express or implied, with the Territory * * * provided, however, that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any territorial officer which such officer is not authorized to make or do by the laws of this Territory."

The agreement by the three officers of the house that plain-

Lloyd v. Territory of Hawaii, 19 Haw. 491.

tiff should be paid for all typewriting done by him must have reference to extra work in addition to the prescribed duties of the stenographer, as it could not be contended on any theory that plaintiff may recover for doing that which it was his duty to do and for which he was paid. The petition does not disclose what, if any, authority the three officers had to make the agreement in question, and consequently it is defective. Such authority must appear from the allegations of the petition. We do not know and it cannot be learned from the petition what the powers of these officers were. As such, the speaker and the chairmen of the committees on accounts and printing have no more power to bind the Territory to such an agreement than any other three members. Although the petition alleges that the typewritten copies of the minutes made by plaintiff were accepted and used by the house, this did not constitute a ratification or an adoption of an agreement which is not shown the officers had power to enter into, as it does not appear that the members of the house had any knowledge of the agreement, and even if they had such knowledge they might have thought that the duties of the stenographer included the work in question. The fact that at former sessions it has been the custom to pay the stenographer extra for such services is immaterial.

It is not clear from the petition whether the services rendered constituted extra work. It is alleged that plaintiff prepared in typewriting the minutes of the house, compiling the same from his stenographic notes, and made copies thereof. It was the duty of the stenographer to transcribe such portions of his shorthand notes as requested whether such request was by the speaker or any other member. If he was required to do something in addition to transcribing shorthand into long-hand, that was not a part of his duty, and the house might properly have authorized payment for such services. On the other hand, if all that was done was transcribing shorthand

Lloyd v. Territory of Hawaii, 19 Haw. 491.

into longhand, that was a part of the stenographer's duty for which he was paid. It should be stated more definitely in case an amended petition is filed.

The demurrer is sustained, and plaintiff may amend, if so advised, within five days.

R. P. Quarles for plaintiff.

C. R. Hemenway, attorney general, for defendant.

N. S. SACHS DRY GOODS CO., LTD., v. ANNIE K.
HART, ALIAS MRS. EDMUND H. HART.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 30, 1909.

DECIDED JULY 7, 1909.

HARTWELL, C. J., WILDER AND PERRY, JJ.

PROCESS—*return of service*.

A return of service is not invalidated by failure to show that it was made as required by statute by delivery of a certified copy of summons and petition.

HUSBAND AND WIFE—*contract for necessities—scire facias*.

A married woman may contract to pay for articles which are necessities, and confess judgment in an action therefor. A defense available in the action cannot be made in scire facias proceedings for the first time if there was jurisdiction over the case.

OPINION OF THE COURT BY HARTWELL, C.J.

The defendant's exceptions are taken to rulings denying her motion to quash the return of a writ of scire facias on the ground that it failed to state the time when and the manner in which service was made, the return, signed by the officer, being: "Served the within petition and writ as follows: Upon Annie K. Hart, alias Mrs. Edmund H. Hart, at Wailuku,

Sachs Company v. Hart, 19 Haw. 494.

County of Maui, Territory of Hawaii, this first day of May A. D. 1909," and deciding that execution issue on the judgment sought to be revived by scire facias notwithstanding the plaintiff's answer claiming that it was void because predicated upon a contract for necessities for which not the defendant but her husband was liable. The action was for goods sold and delivered and upon an account stated. The defendant first filed a general denial which she withdrew, afterward filing a confession of judgment upon which a judgment was entered May 29, 1905, for the sum claimed. The petition for a writ of scire facias was filed April 29, 1909, the writ issuing the following day. After the denial of the motion to quash the return the defendant appeared generally and answered.

The statute, Sec. 1721 R. L., requires service by delivery to the defendant of a certified copy of the summons and of plaintiffs' petition, and it might be well that this be shown in the return although the statute does not require it, but the failure to do so does not invalidate the return. The presumption is, in the absence of a showing to the contrary, that the service was made in the manner required by statute. The statute which authorizes a married woman to make contracts and to sue and be sued is not confined to contracts for purchases which are not necessities nor does it preclude her from contracting to pay for articles which the husband is bound to furnish. The right to make such contracts implies liability to be sued upon them and the right to confess judgment in the action. Moreover, a defense available in the action cannot be made for the first time in a proceeding to revive the judgment by scire facias if there was jurisdiction over the case. Van Fleet, Collateral Attack, Sec. 580, and cases there cited.

Exceptions overruled.

W. W. Thayer for plaintiff.

C. A. Long for defendant.

Matsumura v. County of Hawaii, 19 Haw. 496.

KUMAZO MATSUMURA v. COUNTY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED JUNE 10, 1909.

DECIDED JULY 9, 1909.

HARTWELL, C. J., WILDER AND PERRY, JJ.

JURY—*harmless irregularity in drawing.*

Advantage cannot be taken of an irregularity in the drawing of trial jurors unless it clearly appears that the party objecting was injured.

EVIDENCE—*harmless admission.*

The admission of incompetent evidence of a material fact is an error without prejudice when the fact is proved by other competent and undisputed evidence.

COUNTIES—*liability for unauthorized or prohibited acts of servant.*

A county is liable for injury to private property caused by the negligent act, done in the course of their employment, of road employees engaged to repair a public highway, even though the act was not authorized or was expressly forbidden by the county or was in itself a trespass on the land of third parties other than the plaintiff.

OPINION OF THE COURT BY PERRY, J.

This case has been before this court, on exceptions to the sustaining of a demurrer. 19 Haw. 18. The conclusion on those exceptions was that upon the facts stated in the declaration the county of Hawaii was liable. At the trial, which was had before a jury, a verdict was rendered for the plaintiff in the sum of \$7,500. The case now comes to this court on thirty-four exceptions.

Exception 1. The jury was impanelled January 21, 1909, out of twenty-six names drawn by the judge January 11, 1909. The November term, 1908, of the circuit court of the fourth circuit did not expire until after the conclusion of the trial in this case, the February term opening, under the statute, on the

Matsumura v. County of Hawaii, 19 Haw. 496.

third Wednesday of February, 1909. The regular jurors in attendance at the November term were excused for the term on December 21, 1908. On January 11, 1909, a criminal case, *Territory v. Toon Miung Ho*, was called and the presiding judge directed the clerk to draw a jury for its trial. No jurors being in attendance and more than three talesmen being required, the court, on the theory that the term of service of the 1908 jurors had expired, and without publication of notice, directed the drawing of the twenty-six names just referred to, for the purpose of filling the panel and acting as trial jurors for the residue of the term, out of the list of 150 trial jurors prepared by the commissioners in December, 1908, for the year 1909. In making this drawing the court acted under R. L. Sec. 1782. Prior to the impanelling defendant challenged the array.

The contention is that the failure to publish notice in accordance with the provisions of R. L., Sec. 1779, as amended, rendered the drawing irregular, that under that section no drawing out of the list for 1909 could be made for service during January, 1909, unless for a special term first called and that R. L., Sec. 1782, does not authorize a drawing when no jurors are in attendance or obtainable but only when some, insufficient in number, are in attendance or obtainable. Assuming, but not deciding, that the drawing was irregular, the error cannot result in a new trial, because it does not appear that the plaintiff was injured by the drawing. Sec. 1795 of the Revised Laws reads as follows, omitting immaterial portions: "No person shall take advantage of any irregularity * * * in the drawing, summoning, returning or impanelling of * * * trial jurors unless such irregularity shall have been objected to by him before verdict or unless it clearly appears that he was injured by such irregularity." The word "or" towards the end of the sentence should be read as "and." The context so requires. While defendant's challenge was interposed in

Matsumura v. County of Hawaii, 19 Haw. 496.

time, there has been no showing or claim that the irregularity in any way injured the plaintiff. No reason exists for supposing that it did. It may be added that Sec. 1795 was enacted in 1903 and that no such statutory provision was in force at the date of the decision in *King v. Cornwell*, 3 Haw. 154 (1869), in which case a similar irregularity was apparently regarded as reversible error.

Exceptions 2 to 8, 11, 12 inclusive. The court admitted testimony of a statement to plaintiff by Keola, one of the servants of the defendant engaged in repairing the road at the time of the injury complained of, "I made you a lot of pilikia and I don't care if I *make* (die);" and also of another statement by the same servant to the effect that he, Keola, "was very sorry, that he had no intention of doing anything that way, and he asked my pardon," made in answer to a remark by the witness, who had been injured as a result of the accident in question, "You see what you have done because you didn't mind me and stop the water a little mauka; see the condition I am in now." The acts complained of and the resulting injury to plaintiff's property occurred about noon. The first of these statements was made "in the latter part of the afternoon," and the second a day or two later. The case sought to be established by the plaintiff was that Keola and three others while acting as the agents and servants of the defendant in clearing of weeds a public highway situated in the defendant county negligently tapped a flume which paralleled the highway at that point and caused water to flow in the gutter along the highway for the purpose of carrying off the weeds and that because of this flow of water from the flume to the highway large quantities of earth and rock were loosened and fell against and destroyed certain houses and other property of the plaintiff. The testimony was evidently admitted as admissions of an agent against his principal. Assuming that the admission was erroneous, the error was not prejudicial or reversible. It

Matsumura v. County of Hawaii, 19 Haw. 496.

was abundantly proved by other evidence which stood undisputed that the flume was tapped by Keola and his co-laborers, that the flow of the water diverted caused a land-slide and that the land-slide, whether by the direct impact of the earth and rocks so precipitated or by a resulting shaking of the ground at that point, caused the injury to plaintiff's property. That there was such undisputed proof is admitted, but it is contended on behalf of the defendant that Keola's statements as received in evidence from other witnesses could be construed by the jury as admissions that the material dislodged came in direct contact with the plaintiff's buildings and other property and thus caused the injury and that the error was therefore prejudicial because one of the defences at the trial was that the injury was caused not by direct contact with the earth and rocks but by the quaking of the ground operating upon the flimsily constructed buildings of the plaintiff. Assuming that upon the latter theory the diversion of the water could not be regarded as the proximate cause of the injury, we think that Keola's statements under consideration are incapable of the construction urged and that no reasonable juror could have understood them as being anything further than an admission that he, Keola, or those under him had set in motion the forces which directly or indirectly resulted in the injury. The plaintiff's case was as strong without the testimony as with it. The admission of incompetent evidence of a material fact is an error without prejudice when the fact is proved by other competent and undisputed evidence. See *Railway v. Elliott*, 102 Fed. 96, 106; *Gay v. Farley*, 16 Haw. 69, 79; *Kapiolani Estate v. Thurston*, 17 Haw. 312, 323-326; *Brown v. Spreckels*, 18 Haw. 91, 104.

Exception 9. Plaintiff was asked upon cross-examination, "Can you state, from the appearance of the remains of the warehouse and its contents at the time you arrived from Hilo after this accident took place, in what way the building went

Matsumura v. County of Hawaii, 19 Haw. 496.

down, whether it tumbled over or slid down the bank or how?" This question was correctly disallowed for it called for a conclusion of the witness as to the precise method of destruction drawn from what he saw on the ground. At most his testimony could properly refer to what he saw, leaving it to the jury to draw its inference as to the cause and the method of the injury.

Exceptions 15, 21, 24, 25, 26, 27. Some of these are to rulings on evidence and the others on the subject of instructions to the jury. It is contended that they present the question whether the defendant is liable for acts done by the laborers without express authority or against express directions of the road supervisor. It may well be doubted whether the issue, in so far as it relates to acts against the express directions of the defendant, is raised. We shall, however, consider the subject as though both phases of the matter were properly before us.

Where the employer is an individual or a private corporation the ordinary rule is that the master is liable for the negligence, whether of omission or of commission, of the servant committed within the scope of his employment even though the acts or omissions were not authorized or were expressly forbidden by him. It is not essential in order to render the master liable that the acts complained of were necessary to the performance of the master's business. These principles are well established. The difficulty arises only with reference to their application to particular cases. Whether an act is within the scope of the employment may not be as simple of solution in one instance as in another. The test seems to be that if the servant, for however short a time, goes outside of his master's business and does something wholly disconnected from it purely for private purposes of his own, as, for example to visit his vengeance or spite upon another, the master is not liable; but if the act, however improper or ill advised, and

Matsumura v. County of Hawaii, 19 Haw. 496.

even though wrongful, unlawful or forbidden is done in supposed furtherance of the master's business and for the purpose of thereby performing the latter's work, liability attaches.

A few citations will not be out of place. "The test of the master's liability is not in his consent or intention, nor indeed is it in the intention of the servant. * * * If the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master had directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner." *Cummins v. Sumner*, 3 Haw. 170, 176, 177 (1869).

"It is a well established principle of law that an employer is liable for the conduct of his servant whether it is lawful or not, if it is within the scope of the authority conferred upon him, either expressly or by fair implication * * * the fact that he was only authorized to do the act in a certain way (that is, correctly) does not save the master from liability. If he was authorized to do the act at all, the master is liable for the consequences of his doing it in a different manner, if the mode adopted by him is so far incident to the employment that it comes within its scope; for, having given the servant authority in the premises, he alone must suffer for its abuse. He has set the wrong in motion and must abide the consequences as against innocent parties." *Duncan v. Wilder Steamship Co.*, 8 Haw. 411, 413, 414.

If the act "be done in the course of his employment his master is responsible for it, civiliter, to third persons and it makes no difference that the master did not authorize, or even know, of the servant's act or neglect; for even if he disapproved of or forbid it he is equally liable if the act be done in the course of the servant's employment." *Smith's Master and Servant*, p. 131. See also p. 130, 134, and *Wood, Master and Servant*, 590, 595.

"A master is liable to third persons injured by negligent acts done by his servant in the course of his employment,

Matsumura v. County of Hawaii, 19 Haw. 496.

although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it." *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518, 522, 523.

"We find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment when the particular act causing the injury was done in disregard of the general orders or special command of the master. *Such a qualification of the maxim of respondeat superior would, in a measure, nullify it.*" *Railroad v. Derby*, 14 How. (U. S.) 468.

"At common law the master is responsible * * * whether the wrong done be occasioned by the mere negligence of the servant or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. * * * The fact that the act done is contrary to an express order of the master will not exonerate him." *George v. Gobey*, 128 Mass. 289.

"The question is not what was the nature of the act in itself but whether the servant intended to act in the master's interest." It is sufficient if the servant acted "in the way of his employment and in the supposed interest of his employers," but not if he acted "only for some purpose of his own." Pollock, *Torts*, pp. 61, 62.

"It is not sufficient for the master to give proper directions; he must also see that they are obeyed." 2 Cooley, *Torts*, p. 1028.

See also *Id.*, p. 1033; *Driscoll v. Carlin*, 11 Atl. (N. J.) 482, 483; *Waterworks Co. v. Hubbard*, 4 So. (Ala.) 607-609; *Cosgrove v. Ogden*, 49 N. Y. 255, 257; *Ellegard v. Acklund*, 45 N. W. (Minn.) 715; *Powell v. Deveney*, 3 Cush. 300, 305; *Howe v. Newmarch*, 12 Allen 49, 57; *Bayley v. Railway Co.*, L. R. 8 C. P. 148, 152, 153.

Applying these principles to the case at bar, but still assuming that the employer was an individual or a private corporation, the tapping of the flume was an act done within the scope of the employment of Keola and his collaborators. The use of the water was, it is true, resorted to by the laborers largely for their own convenience in order to save themselves the greater physical exertion required in carting off the weeds in wheel-

Matsumura v. County of Hawaii, 19 Haw. 496.

barrows as they had been directed to do, but this of itself would not free the employer from liability. See *Cosgrove v. Ogden*, supra. It was still an act done towards the performance of the work of repairing the highway for which the men had been employed and in supposed furtherance of that work. Within the meaning of the rule under consideration it was not an act done purely for the purposes of the servant, as it would have been, for example, if the water had been diverted solely for the purpose of applying a neighboring taro patch belonging to Keola. It was not disconnected from the master's employment nor was it born of the malice of the servants or for any private ends of their own.

If instead of diverting the water Keola and his associates had borrowed a mechanical rotary street sweeper drawn by horses,—for the same purpose of doing the work more conveniently and with less physical exertion to themselves—and had thereby caused plaintiff's horse to bolt and consequent damage to his property, the act, although unauthorized or forbidden by the employer, would still be within the scope of the laborer's employment and one for the consequences of which the master would be liable. The same would be true if the laborers had been directed, in connection with their employment to blast certain portions of a highway, not to use more than one-half of an ordinary stick of giant powder in each blast and then had disregarded their instructions and used two or three sticks in a blast thereby causing damage. No distinction in principle exists between these hypothetical cases and the case at bar.

There is great conflict in the authorities as to whether municipal corporations in general and counties in particular are liable for the negligence of their agents and servants. That question, however, has been settled in this jurisdiction and in this case in favor of the existence of the liability. Ante, p. 18. In that opinion this court, recognizing "the general

Matsumura v. County of Hawaii, 19 Haw. 496.

rule of the common law to afford redress for wrongs suffered by individuals," placing the "burden of argument upon those who would exempt any corporation, public or private, from the general doctrine of liability for its torts," and conceding that it was difficult to infer from the declaration in this case "whether the injury was the necessary result of a diversion of the water or whether it arose from the negligent manner in which the act was done," held that "on either theory it (the declaration) states a cause of action as against a municipal corporation" and as against the county of Hawaii. It also held that "when the municipality undertakes to exercise such a power" (of maintaining highways) "and its officers or agents do the work negligently or unskilfully any person damaged in consequence thereof may maintain an action against the municipality," and further said: "The case at bar is concerned only with the invasion of a private right through misfeasance of the defendant's agent, either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable."

In the law of negligence is there any distinction between municipal corporations on the one hand and individuals or private corporations on the other as to liability of the master for the unauthorized or prohibited acts of the servants? The defendant contends that there is and cites in support of his contention certain cases. None of them, as we read them, are on the precise point now under consideration. None of them are cases recognizing that a municipal corporation is liable for the negligence of its servants and then limiting such liability to instances other than those where the act causing the damage was not expressly directed to be done or was expressly forbidden. Each of them is based upon a state of facts essentially different from that in the case at bar. Some of them are cases upon contracts. Others are actions for the

Matsumura v. County of Hawaii, 19 Haw. 496.

value of soil or other material wrongfully taken from plaintiff's property for public improvements. In some of them at least the language used may at first sight seem to support the defendant's present contention, but that language must be read in the light of the facts of the particular case in which it was used and with reference to them. A few of the cases thus cited by defendant will now be referred to in detail.

Whiteside v. U. S., 93 U. S. 247, was an action, originating in the court of claims, to recover a sum of money expended by claimants in hauling, bailing and ginning cotton under an alleged contract with an assistant special agent of the treasury. The appellate court held, with good reason, that the contract was beyond the authority of the person who purported to act for the United States, that two minds are required to make a contract, and that the contract was void. What the court said about acts "within the scope of the authority of an agent" was said with reference to those facts and not in relation to the law of negligence.

In *Caspary v. Portland*, 24 Pac. 1036, 1037, the declaration was held defective in not stating any of the facts which would show whether a *servant* of the city had done the acts complained of and whether he had done them under circumstances rendering the city liable. Upon all the authorities the doctrine of *respondeat superior* does not apply unless the relation of master and servant exists.

In *Chicago v. McGraw*, 75 Ill. 566, 570, compensation was sought for injury caused to the defendant's property by widening a canal. The acts complained of were done by one who claimed to be widening the canal by contract with the city. The contract was not in evidence nor was there proof of any ordinance authorizing the work. The court held that such evidence was necessary and that in its absence it could not infer the making of such a contract or know whether the city's agents or employees "acted within the scope of their duties."

Matsumura v. County of Hawaii, 19 Haw. 496.

Butler v. Oxford, 13 So. (Mass.) 626, was an action for personal injuries. One McEwen was shown to have carried, in the city corporation cart, a stove from a church at the request of the rector and to have deposited it in a highway. Plaintiff's horse shied at the stove and the injury followed. No evidence was introduced tending to show what were McEwen's duties to or employment by the city and the court held that in the absence of such a showing it could not say whether McEwen in carrying the stove was acting within the scope of his duties.

In *Trustees of the Town of Odell v. Schroeder*, 58 Ill. 353, an action for damages for false imprisonment, it was shown that a constable, without a mittimus or other legal process, imprisoned the plaintiff. The court held that the imprisonment was unlawful and that the town was not liable for the constable's illegal acts and their consequences.

In *Kiernan v. Jersey City*, 13 Atl. 170, the court held that the city was not liable for damages caused by a break in a sewer faultily constructed through negligence (to this extent the decision is perhaps contrary to 19 Haw. 18), but that it was liable for permitting the break to continue after receiving notice of its existence and of the injury it was causing plaintiff. The street commissioner dug an open drain across the plaintiff's land to carry off the sewerage from the break. This was held to be a mere trespass,—something the city could not lawfully do and therefore could not authorize its officers to do and hence that the officer was not acting *ex officio* and that the city was not liable.

Hard v. City of Decorah, 43 Ia. 313, was disposed of on the single point that the defendant was not alleged or proved to be a corporation.

In *Hanvey v. City of Rochester*, 35 Barb. 177, the common council passed resolutions authorizing the survey of Butler Avenue and the removal of obstructions therefrom. Plain-

Matsumura v. County of Hawaii, 19 Haw. 496.

tiff alleged that those acting under the resolutions removed his property from land that was his and not a part of Butler Avenue. The court held that the resolution did not authorize trespasses and that for the latter the city was not liable.

As between individuals the rule of respondeat superior "is not based upon any presumed authority in the agent to do the acts but upon the ground of public policy and that it is more reasonable where one of two innocent persons must suffer from the wrongful act of a third person that the principal, who has placed the agent in the position of trust and confidence, should suffer, than a stranger." *Lee v. Village*, 40 N. Y. 442, 448. No reason occurs to us for holding that this reasoning does not apply in its entirety with equal force to municipal corporations in those jurisdictions which recognize liability on the part of such corporations for negligence,—unless it be, as contended for the defendant, that the limitation as against unauthorized or prohibited acts is required or justified in order to avoid the possibility of collusion between irresponsible public servants and third parties. But the latter consideration, if it is forceful at all, ought to result in a declaration of immunity on the part of such corporation from all liability for negligence of whatever sort. On the latter point this court has already held to the contrary. Ante, p. 18. To make the exemption or limitation now asked for in favor of unauthorized or prohibited acts would, in a measure, to use the language of the supreme court of the United States, nullify the rule itself and the effect of the decision of this court on demurrer. *Railroad v. Derby*, supra. In the very great majority of cases of negligence on the part of a servant, whether the master be a public or a private corporation or an individual, the acts or omissions complained of occur without the authority or against the express direction of the employer. If such a qualification were to be adopted it would be exceedingly difficult in many instances to apply it. A direction to

Matsumura v. County of Hawaii, 19 Haw. 496.

a servant to be cautious and prudent and not to be guilty of any negligence would seem in that event to secure immunity to the employer as readily as would any other express command.

Authorities are not lacking which directly or indirectly support the view that the maxim in its entirety applies to municipal corporations. Premising only that the relation of master and servant exists and that the duties relate to the exercise of corporate powers and are for the peculiar benefit of the corporation in its local or special interest, Judge Dillon says, without qualification, that "the maxim of respondeat superior applies." Vol. 2, Sec. 974.

"So also public or municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents acting under their authority and direction, in the construction of public improvements belonging to such corporations. In such cases the maxim respondeat superior properly applies in the same manner and to the same extent as in its application to the liabilities of private individuals." Story, Agency, Sec. 308, pp. 383, 384.

"The rules regarding the liability of corporations for the acts of their agents and officers are the same with those which apply as between masters and servants generally * * * What has been said on this subject will apply to public corporations as well as to private." 1 Cooley, Torts, 208.

"Corporations, whether municipal or aggregate, are now held to the same liability as individuals." *Hilsdorf v. City*, 45 Mo. 94, 96, 97.

"Where the work is once conceded to be done by the corporation it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work." *Eastman v. Meredith*, 36 N. H. 284, 295.

"It is also said that the flooding of B's land is not the result of a public work but of the negligence of the superintendent and therefore the municipality is not liable. The answer to this is that the law so far takes notice of the fallibility and imperfection of all human endeavor that one who entrusts his

Matsumura v. County of Hawaii, 19 Haw. 496.

affairs to his servant under instructions either express or implied to do only that which is lawful, is responsible for the neglect of the servant so to do. The general rules of agency apply to towns. They are 'subject to the same implications arising from their corporate acts, or the acts of their agents within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons.' " *Rhobidas v. Concord*, 70 N. H. 90, 113.

"The corporation if liable at all are answerable for the conduct of their commissioner if he was acting under their authority and was engaged in the work in which they employed him when the injury, if any, was done, although he may have acted without their orders or contrary to them." *Hooe v. Alexandria*, Fed. Case No. 6667.

"The rule respondeat superior, though well recognized in fixing the liability of private corporations and natural persons, has been a source of much doubt and perplexity in its application to municipal corporations. It is, however, now well established that corporations of the latter class, when acting in a certain character or capacity, are liable as superiors and employers, for injuries to third persons resulting from the negligence and unskillfulness of their agents or servants, while in the line of their employment, in the same manner and to the same extent as private corporations or private individuals. Under analogous conditions, there seems to be no foundation in reason or public policy for exempting such public corporations any more than private individuals, from liability for injuries inflicted on others through the negligence of their agents." *City of Toledo v. Cone*, 41 O. St. 149, 159.

In *Barree v. City of Cape Girardeau*, 197 Mo. 382, 391, 392, the petition alleged that the plaintiff was the lessee of a corporation which held a street railway franchise from the City; that it was the duty of the city to keep its streets in repair, and that the city was in the act of repairing the same when the plaintiff came along the track placed in the street, with his car; that one Brunke was the agent and servant of the city in making the repairs and as such piled gravel and broken stone on the street car track so that the car could not pass; that

Matsumura v. County of Hawaii, 19 Haw. 496.

the plaintiff undertook when his car came along to remove the same; that thereupon Brunke, for the purpose of protecting the defendant's street from interference by the plaintiff, negligently and wrongfully committed certain assaults upon the plaintiff. That, perhaps, might be regarded as an extreme case, and yet the court held the defendant city liable, saying, *inter alia*, "It is a well settled principle of law that when an agent or servant is employed to perform a certain piece of work and while in the line of his duty he injures another even though he exceeds his authorized powers or disobeys his injunctions, his employer is responsible to the party injured for damages sustained by reason of such injury."

See also *Hawks v. Inhabitants of Charlemont*, 107 Mass. 414, 418; *Roughton v. City*, 113 Ga. 948 (39 S. E. 316); *Deane v. Inhabitants of Randolph*, 132 Mass. 475, 477; *Johnston v. District of Columbia*, 118 U. S. 19, 21, and *Lee v. Village*, *supra*.

In our opinion the rulings excepted to were correct.

Exceptions 16, 17, 18, 22, 23, 24, 28. Under these it is contended that the fact, if such it was, that the laborers in tapping the flume committed a trespass upon property belonging to the Onomea Sugar Company constitutes a defense to the plaintiff's claim. This is practically disposed of by what has been said on the last preceding point. The negligence consisted in the use of the water. It is immaterial from what source the water was obtained. Keola and the others with him were still the servants of the defendant and obtained the water solely in connection with the defendant's work which they were employed to perform.

Exceptions 10, 13, 14, 19, 20, 29, 30, 31, 32, 33, 34 have been abandoned.

The exceptions are overruled.

C. F. Clemons (*Thompson & Clemons* on the brief) for plaintiff.

Matsumura v. County of Hawaii 19 Haw. 496.

W. H. Smith (*Charles Williams* and W. H. Smith on the brief) for defendant.

MARY H. ATCHERLEY v. W. P. JARRETT, SHERIFF
OF THE CITY AND COUNTY OF HONOLULU,
AND A. N. CAMPBELL, TRUSTEE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 21, 1909.

DECIDED JULY 9, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

EQUITY—*injunction staying execution sale.*

Equity will not, under the circumstances stated in the opinion, enjoin an execution sale of land in order to avoid the sacrifice which would result from a sale pending litigation concerning the title, nor on the ground, which was available and had been adjudicated in the action at law, that the land was claimed by the defendant to be exempt from sale on execution.

OPINION OF THE COURT BY HARTWELL, C.J.

This was a bill for an injunction to restrain the levy upon the plaintiff's real property of an execution on a judgment of the circuit court in an action by the defendant Campbell upon a joint and several promissory notes signed by the plaintiff and her husband. The bill alleges that the plaintiff owns an undivided one-half interest in certain land in Honolulu in the possession of Lewers & Cooke, Ltd., who had brought a petition in the court of land registration to register its title thereto; that upon appeal by Lewers & Cooke from a decree of the land court dismissing the petition a decree to the same effect was entered in this court declaring that Lewers & Cooke have no title, from which decree an appeal to the United States

Atcherley v. Jarrett, 19 Haw. 511.

supreme court is pending; that an action by the plaintiff for possession of the land, brought against the Kapiolani Estate, Ltd., and others, is pending in the circuit court; that the defendant Jarrett upon writ of execution on the judgment has levied upon the plaintiff's right in the land and advertised the same for sale at public auction May 17, 1909; that she has no personal property subject to execution and no real property in possession; that the property levied upon is of the value of about \$35,000 but if sold at public auction prior to the determination of the suits it would be sacrificed and the plaintiff irreparably injured; that Lewers & Cooke have been in possession of the land since 1902 and before and are indebted to the plaintiff for rents in a sum much more than the judgment, so that Campbell can garnishee them and thus collect the judgment without sacrificing the land; that the plaintiff offers to assign her claim for rents to Campbell in payment of the judgment and is willing to mortgage the land to him to secure its payment. The plaintiff submits that her husband not having consented to the levy on her real estate it is not liable for payment of the judgment and that to sell her land on execution would be inequitable as the levy is contrary to law and an attempt to accomplish indirectly a sale of the plaintiff's land without her husband's consent; that the plaintiff sought relief in the action at law by a motion to quash the levy which was denied and that an injunction will avoid multiplicity of suits.

The judge issued a temporary injunction upon the filing of the bill April 30. The defendants demurred on the grounds that the bill shows no equity and that its matters have been adjudicated at law in favor of the defendants, at the same time moving to dissolve the temporary injunction on the ground that it was improvidently issued and not warranted by the facts. The motion was denied, the defendants appealing, by leave of the judge, the ruling being interlocutory.

The defendant's claim is that if the plaintiff had any remedy,

Atcherley v. Jarrett, 19 Haw. 511.

which they deny, it was at law, and that her land is subject to be taken and sold on execution. The probability that the land would be sacrificed by a sale, if made now, might authorize a stay of execution pending the litigation, but if stayed and the case of *Lewers & Cooke* were decided against Mrs. Atcherley the judgment creditor would lose the opportunity of obtaining satisfaction of the judgment. He cannot be required to do this for the benefit of his debtor. If the land was not subject to sale on execution a full and adequate means to protect the plaintiff's right existed at law by the motion to quash the levy.

As held in *Norris v. Herblay*, 9 Haw. 514, equity will not relieve against a judgment by reason of a defense (in that case the statute of limitations) which was available at law; but the plaintiff claims that the order denying her motion to quash the levy was interlocutory and not final and therefore that she could not bring that matter up by a writ of error or on bill of exceptions until after her land was sold, involving additional expense and litigation and clouding her title pending such litigation. By Secs. 1858 and 1859 R. L. appeals are allowed from all decisions of district magistrates and "from all decisions, judgments, orders or decrees of circuit judges," and by Sec. 1861 "an appeal duly taken and perfected in any case from a judgment, order or decree of a circuit judge or district magistrate shall operate as an arrest of judgment and stay of execution;" but an order or decision which is not final is not appealable, as held in *In re Bankruptcy of Gouveia*, 8 Haw. 253; *Prov. Gov't. v. Ah Un*, 9 Haw. 164; *Prov. Gov't. v. Smith*, 9 Haw. 178; *Brown v. Carvalho*, 9 Haw. 180; *Estate of Banning*, 9 Haw. 357; *Same*, 9 Haw. 359; *Spreckels v. Circuit Judge*, 10 Haw. 198, 206; *Barthrop v. Kona Coffee Co.*, 10 Haw. 398.

By Sec. 1864 R. L. exceptions may be taken in trials of actions at law to any ruling or order of the presiding judge,

Atcherley v. Jarrett, 19 Haw. 511.

and by Sec. 1865 R. L., upon the allowance of exceptions and a deposit of \$25 or a bond in the same amount for costs, the questions arising thereon shall be considered by the supreme court, and judgment may be enforced or arrested pending exceptions, as in cases of appeal. It was held in *Prov. Gov't. v. Hering*, 9 Haw. 181, that exceptions to the overruling of a demurrer do not suspend the trial; but upon the subject of finality it is stated in *Dole v. Gear*, 14 Haw. 554, 556: "This court has also recognized that a final decision for the purpose of appeal is not necessarily the last decision in the case, and that its nature or effect rather than the stage at which it is rendered is the true test," the case holding that an order for temporary alimony "is final in its nature though it is not the last decree in the case or even the decree that determines the merit of the main case."

After the order no further rulings were to be made in confirmation of the sale or otherwise involving the question decided on the motion to quash. We are therefore of the opinion that exceptions to the order could have been brought before the sale. See *Laclede Nat. Bank of St. Louis v. Betterton*, 24 S. W. (Tex.) 326; *Phillips & Hudson v. Brazeal*, 14, Ala. 746; *Gale v. Michie*, 47 Mo. 326; *James & Ray, Ex Parte*, 59 Mo. 284; *Packer v. Owens*, 164 Pa. St. 185, 194. This remedy at law excludes the jurisdiction of equity in the case, and furthermore the plaintiff's claim having been adjudicated adversely to her in the action has become res judicata.

Order reversed, case remanded with instructions to grant motion to dissolve injunction.

L. A. Dickey and E. M. Watson for plaintiff.

W. A. Greenwell and A. L. Castle (*Castle & Withington* on the brief) for defendants.

McCandless v. Castle, 19 Haw. 515.

L. L. McCANDLESS v. W. R. CASTLE, TRUSTEE UNDER THE WILL OF JOSHUA R. WILLIAMS, DECEASED, KAHALAUOLA WILLIAMS, ROSE WILLIAMS, HENRY WILLIAMS, EDWARD WILLIAMS, GEORGIANA WILLIAMS, ROSE KEKAHIO, ANNIE SPALDING, JOSEPHINE BOYD, GEORGIANA WRIGHT, LYDIA MOLDENHAUER AND JOSHUA WILLIAMS.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 21, 1909.

DECIDED JULY 9, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

ASSIGNMENTS—*alienability of interest in income.*

An equitable life interest in the income of land, the legal title of which is held by a trustee subject to division upon an event still in the future, is alienable and its assignment will be enforced in equity.

Id.—*partial.*

A partial assignment of such an interest, made without the assent of but with notice to the trustee, is good in equity.

DEED—*operation as constructive assignment.*

An ordinary warranty deed operates in equity as an assignment to the grantee of the grantor's equitable life interest in the income of the property described.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity for an accounting. Joshua R. Williams, who died in 1879 leaving certain real estate situate in Ewa, Oahu, left a will in which he devised to W. R. Castle all of his estate upon trust to "manage and invest the same in such manner as he may judge to be expedient," with power of sale and of reinvesting, "and to retain entire control of said estate during the term of this trust. And to pay the income of said estate to my wife Kaaikaula Williams and to my children Lydia, the wife of W. Chapman, John, Henry, Joshua, Jose-

McCandless v. Castle, 19 Haw. 515.

phine and Georgiana, in equal shares during the terms of their natural lives and the survivor of them," and further providing that "upon the decease of any of my said children his or her share is to be paid to his or her children, if any, by my said trustee until the decease of the survivor of my said wife and children when my estate shall be divided. And upon the decease of any of my said children without issue their share of the income is to be divided by said trustee equally among the survivors and the issue of said deceased children." A codicil revokes the provision for the daughter Lydia giving her \$10 "in full of any share in my estate."

The bill, after reciting the will, alleges that the testator's widow and his sons Henry and John have died intestate; that Henry left surviving him a widow and five children who are now living; that John left surviving him a widow who has since married Joshua, and a son named Othello; that Othello died on or about March 13, 1900, unmarried; that by warranty deed dated October 21, 1899, the testator's children Joshua, Josephine, Georgiana and Lydia, his grandson Othello and the widows of John and Henry conveyed to the plaintiff four certain pieces of land covered by the trust expressed in the will; that in August, 1901, plaintiff notified the trustee of the execution of this deed; that at the time of the execution of the deed the lands named in the deed were producing a stated rental; that in March, 1902, the trustee sold and conveyed these lands for the sum of \$1,343.30; that since October 21, 1899, the trustee has collected rents and other income arising out of these lands and their proceeds, the exact amount of which is unknown to the petitioner; and that the trustee refuses to account to the petitioner for his share of the income. The prayer is that the trustee be decreed to render an account and to pay the petitioner his share of the income.

Defendants demurred to the bill for want of equity and the

McCandless v. Castle, 19 Haw. 515.

circuit judge reserved the question whether the demurrers should be sustained.

As stated in *Williams v. Castle*, ante p. 337, each of the five children of the testator named in the will acquired thereunder an equitable life interest in the income of the property, the title of which is held by the trustee subject to division upon an event still in the future. Such an interest as this, it is well settled, is alienable and its assignment will be enforced in equity. A partial assignment likewise of such an interest even though not enforceable at law is good in equity. The assent of the debtor is not, as perhaps at law, necessary. Notice to him by the assignee of the assignment is sufficient to hold the fund for the benefit of the assignee. 3 Pom. Eq. Juris., 3d ed., Secs. 1280, 1283; *County v. Campbell*, 68 Tex. 22, 27; *Warren v. National Bank*, 149 Ill. 9, 23; *Lanigan v. B. & C. Co.*, 50 N. J. Eq. 201, 204; *The Elmbank*, 72 Fed. 610, 614; *Exchange Bank v. McLoon*, 73 Me. 498, 505, 506; *Bank v. Bayonne*, 48 N. J. Eq. 246, 252; *B. & C. Co., v. Berns*, 51 N. J. Eq. 437, 438; *Appeals of Pennsylvania*, 86 Pa St. 179, 182; *Risley v. Bank*, 83 N. Y. 318, 329; *Preston v. Russell*, 71 Vt. 151, 156, 157; 2 Story, Eq. Juris., Sec. 1044. The reason usually assigned for the distinction as to partial assignments between courts of law and courts of equity is that in the former a multiplicity of suits cannot be avoided while in the latter all of the parties interested in the fund can be joined and a complete distribution made in one suit.

For the trustee it is contended that to recognize a partial assignment like that alleged in the bill will be to cause great inconvenience to the trustee, not contemplated by the testator, in the separation of accounts and that the interest of each of the beneficiaries is of a portion of the entire income and not of portions of the income arising from specific pieces of property covered by the trust. The part of the interest of the beneficiaries which is by the deed sought to be transferred to the

McCandless v. Castle, 19 Haw. 515.

plaintiff is clearly designated. Upon the face of the bill it does not appear that any difficulty or hardship will result to the trustee from the assignment other than some additional book-keeping. For this, if upon the evidence it shall seem proper so to do, compensation can be made to the trustee. See *Exchange Bank v. McLoon*, supra. In a spirit of caution it may be added at this point that if at the trial circumstances are disclosed such as to render enforcement of the assignment harsh and inequitable or impracticable the court will be at liberty to act accordingly and deny the petition. Circumstances can be imagined under which it may have been proper for the trustee, in the performance of his duties under the will, to have applied the whole or a part of the income arising in one or more years from the four specific pieces of property named in the deed to losses suffered in connection with other portions of the corpus of the estate, thus rendering it impossible to divide those parts of the income among the beneficiaries. If any such circumstances are shown at the trial the court will be amply able to protect the trustee as well as all other parties concerned.

The deed to the plaintiff, reciting a consideration of \$250, contains the usual operative words of conveyance, describes the land conveyed and contains the usual covenant of warranty. The ordinary rule is that a deed which purports to convey more than the grantor owns is nevertheless operative as to all of the interest which he does own. 38 Ill. App. 66, cited in 4 Cent. Dig. Col. 1332; *Appeal of Huey*, 1 Grant Cases, 51, cited in 4 Cent. Dig., Col. 1333. See also *Graves v. Amoskeag Co.*, 44 N. H. 462, 464; *Wailuku Sugar Co. v. Parke*, 4 Haw. 89, 93; *Godfrey v. Rowland*, 16 Haw. 377, 389; *Putnam v. Story*, 132 Mass. 205, 213; 1 Warvelle, Vendors, Sec. 31, and 2 Devlin, Deeds, Sec. 850. In our opinion the deed in question operates in equity as an assignment to the plaintiff of the interests at least of Joshua, Josephine and

McCandless v. Castle, 19 Haw. 515.

Georgiana in the income. No particular form of words is necessary to make an equitable assignment. The intent of the parties is what is to be sought for and enforced. Even assuming that the parties in this instance in giving and receiving the deed believed that the grantors had interests in the land itself as distinguished from its income, it seems clear to us that the intention was that the grantors transfer to the grantee all of their interest not only in the land itself but also in all that it should thereafter produce whether by way of rent, interest or otherwise. It would be doing violence to their intent to now hold that all or any part of the interest of the grantors in the income has not passed to the grantee but is still in the grantors and collectible by them.

Much has been said on behalf of the trustee to the effect that the trust created by the will is an active trust; that the trustee was thereby vested with large discretionary powers and that that discretion cannot be interfered with by a court of equity. Assuming all this to be so, the enforcement of this partial assignment will not constitute an interference with the exercise of the trustee's discretion or with his control over the corpus of the estate. He will still continue as heretofore to manage the property, to sell it at his discretion and to invest and reinvest. He will be simply required to pay a certain share of the income to the plaintiff to whom it now belongs, and to refrain from paying it to his grantors who no longer own it.

If there is any equity in the bill the demurrer must be overruled. It will be unnecessary, therefore, to decide who are the remaindermen under the will, whether the remainders are vested or contingent, whether Othello's interest was *pur autre vie* or only during his own life, whether at his death his heirs or devisees took anything, or whether the trustee can be required to account for any share of the income which accrued prior to the date of the notice to him of the assignment.

McCandless v. Castle, 19 Haw. 515.

The reserved question is answered in the negative.

A. G. M. Robertson for plaintiff.

A. L. Castle and W. A. Greenwell (*Castle & Withington, Holmes, Stanley & Olson* and T. M. Harrison on the briefs) for defendants.

JAMES W. LLOYD v. TERRITORY OF HAWAII.

ORIGINAL.

ARGUED JULY 3, 1909.

DECIDED JULY 14, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

PLEADING—*action against Territory.*

In an action against the Territory on an unauthorized contract made by certain officers of the house of representatives the petition showing that such contract was ratified by the house is good on demurrer.

OPINION OF THE COURT BY WILDER, J.

A demurrer to the original petition having been sustained (ante, p. 491,) and plaintiff having filed an amended petition, the defendant again demurs on the same grounds as before.

A restatement of the allegations in the first petition and which are again set forth in the present one will not be made. It definitely appears in the amended petition that the services rendered by plaintiff for which compensation is sought in this action were not a part of his duties as stenographer of the house of representatives and constituted extra work. Rule 19 of the house provides in part that "all of the officers of the house shall be directly responsible to the speaker and shall obey and perform all of his orders and directions subject to

Lloyd v. Territory, 19 Haw. 520.

revision by the house." Rule 27 of the house makes it the duty of the committee on public expenditures and accounts to "superintend and control the contingent expenses of the house and to audit and settle all accounts which may be charged thereon," and further provides that "no bills shall be incurred without the order of the said committee." The reasonable value of the services is also alleged.

The power of the speaker to require the officers of the house to obey and perform his orders and directions did not give him power to bind the house to pay for extra work which he ordered or directed to be done, but only had reference to orders and directions in regard to the regular, usual and prescribed duties of the officers. Nothing is alleged as to the powers of the committee on enrollment, revision and printing. Whether the committee on public expenditures and accounts, whose functions during the time in question it is alleged were assumed and performed by its chairman with the acquiescence of the other members of the committee, had the power to enter into the agreement with plaintiff in regard to compensation for extra work by implication from its duty to superintend and control the contingent expenses of the house and to audit and settle all accounts charged thereon, need not be determined in view of our conclusion on the subject of ratification.

It is alleged, however, that the extra work was performed for additional compensation with the assent and full knowledge of the members of the house, and that with such knowledge the result of the work was accepted and used by them, although in deference to the wishes of the speaker and one other member a resolution to pay plaintiff for such services was laid on the table. As the house could have directed the performance of these services and the payment therefor, when with full knowledge of the fact that the speaker had directed the stenographer to perform some extra work and that he with the chairmen of the two committees had agreed with plaintiff on com-

Lloyd v. Territory, 19 Haw. 520.

pensation therefor, it accepted and used the result of the work, that in effect constituted a ratification of the acts of the speaker and the chairmen of the committees in that regard.

“The rule is well settled that where a principal accepts the benefits of an unauthorized act of an agent with knowledge, actual or constructive, of all the material facts, he is deemed to have ratified the act and is bound thereby.” *Harrison v. Magoon*, 14 Haw. 418, 424.

The demurrer is overruled, defendant being allowed twenty days within which to answer, if so advised.

R. P. Quarles for plaintiff.

E. W. Sutton, Deputy Attorney General, for defendant.

IN THE MATTER OF THE ESTATE OF WILLIAM
BRASH, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JULY 12, 1909.

DECIDED JULY 14 1909

HARTWELL, C.J., WILDER AND PERRY, JJ.

LANDLORD AND TENANT—*fire claim award*.

Under Act 15 of the Laws of 1901 a lessee whose only right with reference to the buildings on the demised land is to use them during the unexpired term of the lease, is not entitled to damages for the loss of such use.

OPINION OF THE COURT BY PERRY, J.

(Hartwell, C.J., dissenting.)

The fire claims commission appointed under Act 15 of the Session Laws of 1901 “to provide for the ascertainment and payment of all claims which may be made by persons whose

Estate of Brash, 19 Haw. 522.

property was destroyed by fire in the years A. D. 1899 and 1900, under orders of the board of health," made an award No. 6680 in favor of "Estate of" one Brash for the loss of certain buildings in the sum of \$800, stating on the face of the judgment, "Above award subject to interest of Claim 5451." Upon the latter claim the judgment of the commission in so far as it is material to this case was: "Award on buildings in above claim made to claim 6680 is subject to the interest as it may appear of this claim No. 5451 for \$800." The buildings referred to in both of these awards stood upon land owned by the estate of Brash, and had been erected by the appellants, Pang King Chee and Lum Kan as partners under the firm name of Yee Sing Stables, who held the land under a lease which provided that all future erections and improvements on the land should be delivered up to the lessor at the expiration of the term of the lease or other sooner determination thereof. The appellee is an heir at law and devisee under the will of Brash. The order of the circuit judge now appealed from, directing payment of the whole sum of \$800 to appellee, was made upon two motions, one by the appellee and the other by the appellants, filed in the above entitled matter, each movant asking for an order of payment to him of the whole sum.

It is unnecessary to attempt to construe the two awards any further than to say that neither of them contains an adjudication that the present appellants are entitled to the whole or any part of the \$800. Upon what theory the commission proceeded in omitting to adjudge specifically what the lessees' right to damages was, we need not say. It may be assumed that the condition in which the commission left the matter is such that the right of the lessees in this \$800 may now be determined judicially and also that the particular method of ascertainment, by motion in probate, followed before the circuit judge in this instance, is the correct one,—for we think

Estate of Brash, 19 Haw. 522.

that the appellants are not in any event entitled to any part of the amount awarded.

Act 15 upon its face shows that the Territory in consenting to hold itself liable for losses caused by the fire of 1899 and 1900, intended to limit that liability to payment for losses of only certain kinds of property. The term "property" as used in general law and sometimes in statutes includes, it is true, many rights and interests, sometimes referred to as intangible things; and would also include a right secured by contract to the use of buildings for a stated time. In this instance, however, the statute, while providing for compensation "for the destruction of or direct damage to property by fire," specifically directs (section 7) that the commission shall allow "no claim for speculative or consequential damage or for loss of rent or use of property, or loss of profits through the interruption of business," or, omitting immaterial portions, "no claim * * * for loss of * * * use of property." This language, it seems to us, is too clear to require construction. The appellants' property, it is unquestioned, consisted merely in the right to use the buildings (and the land) during the unexpired term of the lease. While they undoubtedly suffered a loss by reason of the fire, that loss was of a kind for which under the express terms of the statute no allowance was permitted to be made.

The order appealed from is affirmed.

J. Lightfoot for the appellant.

E. M. Watson for the appellee.

DISSENTING OPINION OF HARTWELL, C.J.

Sec. 7 of Act 15 S. L. 1901, to "provide for the ascertainment and payment of *all claims* which may be made by persons whose *property* was destroyed by fire" under orders of the board of health in connection with the suppression of the bubonic plague in Honolulu, provides that no claim shall be

Estate of Brash, 19 Haw. 522.

considered "for loss of rent or use of property" nor for "any loss *except* for the *destruction* of or *direct damage* to property by fire or removal."

The case presents the question whether under the act lessees have a claim for loss incurred by the burning of buildings erected by them on leased premises under a lease providing that at its termination the buildings shall belong to the lessor. Was the loss to the lessees not the subject of a claim because it was the loss of the use of property, or have they also lost property which is not only capable of being lost but subject to a claim under the act? The term "property" means that which is exclusively one's own. Any title, legal or equitable, perfect or imperfect, in lands, is property. *Soulard v. U. S.*, 4 Pet. 511; *Bryan v. Kennett*, 113 U. S. 192. Property includes every species of valuable right and interest, easements, franchises and hereditaments. *Caro v. Metropolitan Elevated Ry. Co.*, 46 N. Y. Super. Ct. Rep 138. A mining claim "is property in the highest sense of the term." *Belk v. Meagher*, 104 U. S. 283. Does the act prohibit a claim for the kind of property consisting in a right to its use and refer exclusively to losses of property owned by the claimant? I think it includes losses for the destruction of any kind of property. A lessee is subjected to loss of his property by the destruction of buildings on leased premises losing further opportunity to exercise his right to use and occupy them for the balance of the term, the reversioner losing his reversionary right in the buildings. Each was a right in and to the buildings and each right had value.

I think that the act allows claims for loss of that kind of property consisting in a right to its use to the exclusion of its owner, although not for loss of the use of property which is not exclusive. In this view the award of \$800, fixed as the value of the buildings, would entitle the lessees to interest

Estate of Brash, 19 Haw. 522.

upon that sum at legal rates from the date of the destruction of the buildings until the termination of the lease, the principal, less the interest, going to the reversioner.

SOLOMON KAUHANE, HARRY KAUHANE, KAPEKA KAUHANE, WAIMAHUI KAUHANE AND KAMAUKAALII KAUHANE, MINORS, BY THEIR GUARDIAN, HENRY SMITH, AND KAPEKA BAKER *v.* WILLIAM LAA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 16, 1909.

DECIDED JULY 19, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

EXCEPTIONS, BILL OF—*extension of time for.*

An extension of time for filing a bill of exceptions can be validly granted only within the time allowed by statute or within any prior extension of time.

The ruling on a motion for a new trial does not suspend the judgment or operate as an extension of time within which to incorporate in a bill exceptions otherwise barred.

Id.—*Dismissal of bill.*

If one or more exceptions are properly incorporated in the bill and presented in time, neither the bill nor the remaining exceptions can be dismissed.

EVIDENCE—*sufficient to support verdict.*

The evidence in this case held sufficient to support the verdict.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for money had and received being the rentals of certain lands alleged to have been collected by the defendant. The verdict was for the plaintiffs for \$320 and interest. Defendant brings a number of exceptions.

Kauhane v. Laa, 19 Haw. 526.

Upon the case being placed on the calendar plaintiffs moved "that the bill of exceptions * * * and all of the exceptions therein contained save exception No. 17 * * * be dismissed by the court," on the ground that "said exceptions with the exception of No. 17 aforesaid" were not filed, presented and allowed within the time prescribed by law. The circumstances are these: Defendant's motion for a new trial was filed March 17, 1909, and argued and denied on April 19, 1909. On April 27, 1909, and not until then, the time for filing and presenting a bill of exceptions was extended until twenty days after the receipt by the defendant of a transcript of the evidence from the official stenographer. Exception No. 17 is to the denial of the motion for a new trial. Exception No. 18 is to a ruling made March 22, 1909, in taxation of costs. The remaining exceptions are to the verdict and to rulings made during the trial. Sec. 1864, R. L., as amended provides that exceptions may be incorporated in a bill only "within twenty days after verdict * * * or in the case of exceptions taken subsequently to verdict * * * after the opinion, direction, ruling or order to which said exceptions were taken or such further time as may be allowed by the judge." It is settled that such an extension of time to be valid must be granted within the time allowed by the statute or within any prior extension of time. *Kapiolani Estate v. Peck & Co.*, 14 Haw. 580, 582; *Kapiolani Estate v. Thurston*, 16 Haw. 147, 148. It is also settled, however, that if one or more exceptions are properly incorporated in the bill and presented to the judge within the time allowed by law the bill cannot be dismissed. *Harrison v. Magoon*, 16 Haw. 169, 172; *Territory v. Cotton Bros.*, 17 Haw. 608, 611. We do not care to adopt, as we are requested to do by the plaintiffs, the practice of *dismissing* in limine, as distinguished from *overruling*, some only of the exceptions contained in the bill. The appellee in such cases is sufficiently pro-

Kauhane v. Laa, 19 Haw. 526.

tected by the refusal of the court at the proper time to consider the exceptions which were not incorporated in the bill, presented or allowed within the time required by law. Exception No. 17, it is admitted, was properly incorporated in this bill and was presented and allowed in time (see *Harrison v. Magoon*, supra, pp. 172, 173) and must, in so far as this preliminary objection is concerned, receive consideration on its merits. For these reasons the motion to dismiss was denied.

The only exception which was presented within the time required by law is that which was taken from the dismissal of the motion for a new trial. *Harrison v. Magoon*, supra, pp. 332, 334. "The remaining exceptions which were taken to rulings during the trial" and to the order concerning the taxation of costs, "were not 'incorporated in the bill of exceptions and presented to the judge' 'within twenty days after verdict or such further time as may be allowed by the judge,' as required by the statute * * *. The motion for a new trial * * * did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions in the bill or to present the same to a judge." Id. 334.

The motion for a new trial was based on the grounds (1) that the verdict is contrary to law and the evidence, (2) that the instructions given are contrary to law, and (3) that the court erred in refusing to give "many of the instructions asked by the defendant." Some of the questions arising under this motion have not been referred to in appellant's brief and must be deemed to have been abandoned.

The land which yielded the rents in controversy was awarded by patent to one Nakaikuana, also called in the evidence Kaikuana. The patentee died about 1853, leaving surviving him a brother, Hao, and no issue. Hao in turn left surviving him Pelani, his widow, and three children, Solomon Kauhane, Haui, also called Haui Opio, and Laa the defendant. In 1880 Solomon Kauhane conveyed all of his interest in the land

Kauhane v. Laa, 19 Haw. 526.

to Pelani. Haui Opio died in 1885. Subsequently Pelani executed a deed of all of her interest to Kauhane. The lease under which the rents in question accrued was executed by Pelani while she held the title to a portion of the land. The minor plaintiffs are the children, and Kapeka Baker the widow, of Solomon Kauhane. The foregoing facts are practically undisputed on the evidence. On the issue whether Haui Opio died before or after reaching the age of majority the evidence is conflicting, but there is clearly sufficient evidence to justify the finding, which was evidently made by the jury, that he was of age, in which event his interest passed to his mother Pelani as his sole heir. The jury could also have well found that Kaikuana did not leave a widow and that his parents died before him. Upon the questions whether Kaikuana, the patentee, had another brother, Haui, whether Haui died before or after the patentee, and whether he was ever married, the evidence is in a confused and, to our minds, somewhat unsatisfactory state. The testimony on this point came from witnesses whose recollection, apparently, was vague and uncertain or who were not adhering strictly to the truth in all that they said. The state of the evidence, however, was such as to support the finding, which the verdict shows must have been made by the jury, either that Haui, Sr., was not the brother of Kaikuana or, if he was, that he died before the patentee and left no issue or that he was never married, in which latter event it would be immaterial whether he died before or after Kaikuana. On any of these theories the plaintiffs would be entitled to recover two-thirds of all of the rents collected by the defendant during the period in controversy, which is what the jury awarded.

Referring to the second point presented by the defendant in his brief, there was sufficient evidence to support the finding that the defendant actually received the moneys alleged to have been collected by him. It is true that there was also

Kauhane v. Laa, 19 Haw. 526.

evidence tending to show that a part of the money, while receipted for by him, had been paid by the lessee not to him but to Pelani, but as has been repeatedly held by this court where the evidence is thus conflicting the question is one solely for the jury. Defendant further contends that the court erred in instructing the jury that "in the absence of evidence of any claim to the land in question by the heirs of Haui or Ohao, you will be justified for the purposes of this case in concluding that the occupancy of the land in question by the widow of Hao, Pelani, and her children, was through claim of title as heirs of Hao." This question is not properly before us as the second ground of the motion for a new trial is too general. So, also, is the third ground of the motion. See *Harrison v. Magoon*, 16 Haw. 332, 334, 335. It may be added, however, that none of the other instructions given are set forth in the record and that it is impossible to say under the circumstances that in giving this instruction any error was committed. The instruction may well have been harmless, if not correct.

Defendant further contends that Pelani's deed to Solomon Kauhane was not delivered and that, even if delivered, it was not operative to convey Pelani's interest as heir of Haui Opio. The evidence was clearly sufficient to support a finding of delivery. In the deed Pelani conveys "all of my interest of whatsoever nature or kind in law and in equity, in and to all of the lands and other properties of my former deceased husband Hao (k) situate in the district of Ewa aforesaid or in any other part perhaps of the Hawaiian Islands aforesaid." As appears from what has been already stated, the jury must have found that Hao at his death held the whole title to the land. The grantor's intention to convey *all* of her interest in that land, from whatever source derived, is clearly expressed in the language above quoted, in spite of the omission to refer specifically to the interest inherited from Haui Opio in the

Kauhane v. Laa, 19 Haw. 526.

later clause, "being the interest obtained by me as the widow of said Hao (k) and by virtue of a certain deed from said Solomon Kauhane (k) recorded in the registry office of the government in Honolulu aforesaid in Book 68, pp. 475 and 476."

The exceptions are overruled.

W. W. Thayer for plaintiffs.

W. C. Achi for defendant.

IN THE MATTER OF THE ESTATE OF MARY DAME
HALL, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED AUGUST 10, 1909.

DECIDED AUGUST 20, 1909.

WILDER AND PERRY, JJ., AND CIRCUIT JUDGE WHITNEY IN
PLACE OF HARTWELL, C.J.

CONSTITUTIONAL LAW—*inheritance tax statute*.

The inheritance tax statute (Laws of 1905, Act 102) does not violate the United States Constitution.

TAXATION—*inheritance tax—property within Territory*.

Under the inheritance tax statute shares of stock in domestic corporations, owned by a nonresident decedent, are property within this Territory and subject to the provisions of the act.

OPINION OF THE COURT BY WILDER, J.

Mary Dame Hall died testate in New Jersey leaving a large amount of property. Her will having been admitted to probate in that state letters of ancillary administration with the will annexed were granted to S. M. Damon by a circuit judge of the first circuit to administer upon a certain amount

Estate of Hall, 19 Haw. 531.

of cash in this Territory and shares of stock in a number of domestic corporations, upon the transfer of which property under the will an inheritance tax was assessed.

The administrator having appealed from the decree assessing the tax, two questions are presented for consideration, namely, (1) whether the inheritance tax statute (Act 102, S. L. 1905,) is unconstitutional in that it is contrary to the fifth and fourteenth amendments to the constitution, and, if not, (2) whether shares of stock in domestic corporations owned by a nonresident decedent are subject to the provisions of the statute.

The first point is that the statute is unconstitutional because it provides for a classification which is claimed to be arbitrary and discriminative, the classification being that in the case of certain relatives the tax is two per cent. on the value of the property received in excess of \$1000, while in all other cases the tax is five per cent. on the value of the property in excess of \$500. In our opinion the classification is a reasonable one and the act is valid. See *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283; *Campbell v. California*, 200 U. S. 87; *Board of Education v. Illinois*, 203 U. S. 553; *Billings v. Illinois*, 188 U. S. 97.

The second and main contention is that shares of stock in domestic corporations owned by a nonresident decedent are not property within this Territory and consequently not subject to the provisions of the statute. Section 1 of the act provides that "All property which shall pass by will or by the intestate laws of this Territory, from any person who may die seized or possessed of the same while a resident of this Territory, or which, being within this Territory, shall so pass from any person who may so die while not a resident of this Territory" shall be subject to the tax.

The question, in brief, is whether the shares referred to are property within this Territory. That the shares are property

Estate of Hall, 19 Haw. 531.

is of course clear and is conceded. Counsel for the appellant also concedes the power of the legislature to provide for a tax on a succession to such shares of stock but insists that it has not done so. The fiction that personal property has its situs at the domicile of its owner is not relied on, as it is conceded that the act covers personal property of a nonresident which is tangible and is physically situated within the Territory. It is argued that shares of stock are intangible property and have no physical situs whatever in the absence of a provision to the contrary in the act. In section 24 of the act "property" is defined to mean "the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individuals, legatees, devisees, heirs, next of kin, grantees, donees, vendees, or successors and shall include all personal property within or without the Territory." This definition includes intangible as well as tangible property.

In *In re Bronson*, 150 N. Y. 1, it was held that the transfer of shares of stock in corporations incorporated under the laws of that state held by a nonresident decedent was subject to taxation under the New York statute which provided for a tax on the transfer of property within the state when the decedent was a nonresident at the time of his death. The reasoning by which that conclusion was reached was that a share of stock was but an undivided interest in the property of the corporation and that it had a tangible and visible existence in the state where the corporation existed and had its property. That case has been followed in a number of later decisions.

In *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, the court had no hesitation in holding that the statute of that state imposing a tax upon the transfer of assets within that state included shares of stock in Maryland corporations held by a nonresident decedent. Some emphasis was laid on the fact that the contrary conclusion contended for would result in a

Estate of Hall, 19 Haw. 531.

discrimination against residents in favor of nonresidents which it was held the legislature did not intend to make.

In *Greves v. Shaw*, 173 Mass. 205, *State v. Hamlin*, 86 Me. 495, and *Gardiner v. Carter*, 74 N. H. 507, it has been held that shares of stock in domestic corporations of a nonresident decedent were property within the state and subject to the inheritance tax statutes of those states which imposed a tax on the transfer of all property "within the jurisdiction" of the state, and, except in New Hampshire, whether "tangible or intangible." The appellant concedes the force of these last decisions, but argues that property within the jurisdiction of a state is not necessarily within the state.

In *Neilson v. Russell*, 69 Atl. 476, the supreme court of New Jersey held that shares of stock in a New Jersey corporation which were owned by a nonresident at the time of his death were property in New Jersey and subject to the inheritance tax statute of that state. That judgment was reversed by the court of errors and appeals of New Jersey in 71 Atl. 286, 19 L. R. A. (N. S.) 887, on the theory that all that the New Jersey statute attempted to tax as to nonresidents was in cases of inheritance, distribution, bequest and devise, which words were held to be applicable to the general succession to the whole estate and not to the particular succession of a portion of the estate, which in that case was the stock of a New Jersey corporation. The upper court assumed, without discussing, that the stock of the New Jersey corporation was property in New Jersey.

A further reference to the cases is unnecessary in view of the fact that we are satisfied that our act shows that the shares in question are property within this Territory and that therefore they are subject to the provisions of the statute. Any doubt there might otherwise be in regard to the matter is definitely settled when section 11 of the act is considered. By that section it is specifically provided that no corporation shall

Estate of Hall, 19 Haw. 531.

“deliver or transfer any securities, deposits or other assets of the estate of a *nonresident decedent, including the shares of the capital stock of * * * the * * * corporation * * ** without retaining a sufficient” amount to pay the tax assessed on the transfer of such shares. Thus it is clear that that section, when read in connection with section 1 of the act, shows that property within this Territory passing from a person who dies while not a resident of this Territory includes shares of stock in domestic corporations.

The decree appealed from is affirmed.

C. H. Olson (Holmes, Stanley & Olson on the brief,) for the administrator.

C. R. Hemenway, Attorney General, for the Territory.

IN THE MATTER OF JOHN ATCHERLEY, AN
ALLEGED INSANE PERSON.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 10, 11, 1909.

DECIDED AUGUST 20, 1909.

WILDER AND PERRY, JJ., AND CIRCUIT JUDGE WHITNEY IN
PLACE OF HARTWELL, C.J.

APPEAL AND ERROR—*appeals in insanity cases.*

Since the enactment of Act 149 of the Laws of 1909 no appeal lies to a circuit court from the decision of a district magistrate adjudging a person to be insane.

CONSTITUTIONAL LAW—*creation of board of commissioners of insanity.*

The provisions of Act 149 creating a board of commissioners of insanity are not in violation of Sec. 81 of the Organic Act.

INSANE PERSONS—*due process of law.*

The procedure prescribed by Act 149 relating to the examination and committal of persons alleged to be insane secures to such

In re Atcherley, 19 Haw. 535.

persons due process of law within the meaning of the constitutional requirements on the subject.

CONSTITUTIONAL LAW—*validity of Act 149 of 1909.*

Assuming that sections 10 and 14 are unconstitutional, the remainder of the act is not for that reason invalid.

OPINION OF THE COURT BY PERRY, J.

On July 20, 1909, the district magistrate of Honolulu, after trial, found that Dr. John Atcherley, hereinafter named the petitioner, was insane and that the public safety required his restraint until he should become of sound mind, and made an order committing the petitioner to the Insane Asylum in Honolulu, Oahu, there to remain until he should become of sound mind or be discharged according to law. From that judgment petitioner appealed to the circuit court of the first judicial circuit of this Territory, demanding a trial by jury. Upon a motion by the petitioner that the cause be set for trial and a motion by the Territory and the County that the appeal be dismissed on the ground of lack of jurisdiction, the circuit court reserved for the consideration of this court the following questions:

“First. Has the circuit court power and is it its duty to set down for trial before a jury the matters and things at issue upon said appeal taken from said decision, judgment and order of commitment of said district magistrate?”

“Second. Has the circuit court jurisdiction under the law of the appeal from a decision, judgment and order of commitment made by a district magistrate finding a person to be insane and that the public safety requires his restraint, and committing him to the Insane Asylum of Honolulu, City and County of Honolulu, Territory of Hawaii, until such person becomes sane or is discharged according to law?”

The petitioner claims (1) that Act 149, approved April 28, 1909, does not repeal the statutory provisions in force just prior to its enactment granting, as held in the case of *In re Atcherley*, 19 Haw. 346, an appeal from the decision of the

In re Atcherley, 19 Haw. 535.

district magistrate to the circuit court; (2) that the provisions of Act 149, attempting to create a board of commissioners to hear and determine insanity proceedings, are invalid because contrary to Sec. 81 of the Organic Act; and (3) that Act 149 is unconstitutional (a) because it does not secure to an alleged insane person due process of law as a prerequisite to a committal to the asylum, and (b) because it authorizes detention of an inmate after he has become sane and without permitting him due process of law to ascertain whether or not he has become of sound mind.

(1) It is true that Act 149 does not in terms repeal or declare inapplicable the statutes which in 19 Haw. 346 were held to give an alleged insane person the right of appeal to the circuit court; but by necessary implication the act contains such repeal or declaration. Upon its face the act shows that it was clearly intended to make complete provision in the matter of committal and discharge of persons to and from the asylum. It is entitled "An Act to Provide for the Examination, Detention, Custody and Care of Insane Persons and for the Appointment of Commissioners to Examine Such Insane Persons, and Defining Their Duties, and to Repeal Sections 1116, 1117, 1118 and 1119 of the Revised Laws of Hawaii." The four sections last named contain the only provisions in force prior to the enactment of Act 149 relating to such committals and discharge, save only as to the right of appeal. The act itself provides that upon complaint by certain described persons any person believed to be insane may be arrested and taken before a district magistrate or a circuit judge and thereupon it shall be the duty of the magistrate or judge to examine into the question of the sanity of the arrested person, and that if the judgment be that the person is insane and that it would be unsafe to allow him to be at large the magistrate or judge shall issue a commitment directing the superintendent of the asylum to detain the patient until he becomes sane or is dis-

In re Atcherley, 19 Haw. 535.

charged as in the act provided. The act then specifically declares that the alleged insane person may appeal to certain commissioners of insanity, whose appointment is likewise provided for, by complying with certain stated formalities. It is made the duty of the commissioners, among other things, to hear and determine all insanity cases brought before them on appeal. Following the ordinary rule in matters of construction the enumeration of the one right of appeal must be regarded as showing an intention to exclude any other right of appeal. Moreover, the act in Sec. 14 specifically provides that "no person shall be committed to the Insane Asylum or be discharged therefrom except as herein provided." To permit an appeal to the circuit court would be to permit commitments and discharges by that court. The language of the act leaves no room for the supposition that the legislature intended to leave it optional with the alleged insane person to appeal either to the circuit court or to the commissioners of insanity, but on the contrary negatives any such intention. It is worthy of note, too, that the enactment of this statute came almost immediately after the decision in 19 Haw. 346, the latter having been rendered in February, 1909. In that case for the first time, as far as we know, in the history of Hawaii, the right of appeal to an ordinary jury in an insanity case had been claimed and enforced. The inference would seem to be that the legislature took the view that such a jury of laymen was ill qualified to hear and determine the question of whether or not a person is of sound mind and therefore substituted a new procedure, which in its opinion would be better adapted to the nature of the case.

(2) Sec. 81 of the Organic Act provides "that the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish." The contention is that if the board of commissioners of insanity is a court at all it is a

In re Atcherley, 19 Haw. 535.

court of last resort and therefore not an inferior court and beyond the power of the legislature of Hawaii to create. It is also contended, however, by the petitioner that the board is not a court at all. If the latter be the correct view, there was certainly no violation of Sec. 81 in the creation of the board. On the other hand, if the board is a court, it is in our opinion an inferior court within the meaning of the term as used in that section. It is inferior in the sense that it is subject to control by the higher courts by prohibition and mandamus, and inferior also in the sense that it is a court of very limited jurisdiction. See 11 Cyc. 658, and *Bailey v. Winn*, 113 Mo. 155, 159. In so far as by the act the circuit court is deprived of jurisdiction in the matter the authority in the legislature to make such a change in our laws is specifically recognized in the same section of the Organic Act, which says, "And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." See also 23 Opinions Attorney General, 539.

(3a) No definition of the words "due process of law," appearing in the fifth and fourteenth amendments to the constitution, such as can apply in all cases, has been attempted by courts or text writers. Courts have merely determined with reference to the particular case under consideration whether or not the procedure followed secured to the parties interested due process of law. Its essential elements, all recognize, are notice and an opportunity to be heard. See, for example, *In re Atcherley*, 19 Haw. 346, 349. It contemplates an orderly proceeding, provided by law, adapted to the nature of the case and operating on all alike. See *Garrin v. Daussman*, 114 Ind. 429, 433; *State Ex Rel. v. Billings*, 55 Minn. 467, 474, 475; *Ex Parte Wall*, 107 U. S. 265, 289. The hearing required by the act to be had before the magistrate complies with ail

In re Atcherley, 19 Haw. 535.

requirements. Notice to the alleged insane person is provided for and "a full hearing, at which the alleged insane person shall have the right to be heard personally or by counsel and to produce witnesses on his or her own behalf" is required. Nor is it now contended that the prescribed proceedings before the magistrate lack any of the essentials of due process of law. What is contended is that since the act permits an appeal by the alleged insane person to the board of commissioners the procedure before the latter must in turn be such as to meet all of these requirements or otherwise the act is unconstitutional. The weakness of this position is that due process of law does not require more than one trial. The right of appeal is not essential. *Reetz v. Michigan*, 188 U. S. 505, 508. The petitioner cannot complain that the legislature in its anxiety to make it impossible for a sane man to be committed to the asylum permits him a second trial, before the commissioners of insanity, which the constitution does not guarantee him. It is optional with him whether to exercise the right so conferred or to omit to do so. If he exercises it, he takes it as it is given to him. We are not to be understood, however, as in any way intimating that the trial provided for before the commissioners does not in itself fulfil all the requirements of due process of law. The only objection made to it by the petitioner is that the commissioners are not given the power to compel the attendance of witnesses or to administer oaths. It may be that by a proper construction of the act such power must be held to be conferred by implication, or it may be that the procedure provided, notwithstanding the omission of such power, is sufficient and valid. Upon these questions we express no opinion.

The petitioner further contends that due process in the matter of the committal to the asylum is denied him in that a trial by jury is not permitted. The constitutional provision under consideration, however, does not of itself require continued

In re Atcherley, 19 Haw. 535.

adherence to that method of trial, if such was the sole procedure at the time of the adoption of the constitution. Other provisions of the constitution secure such a trial in certain classes of cases, but this case is admittedly not within any of those classes. The law is to a certain extent a progressive science. *Holden v. Hardy*, 169 U. S. 366, 385. Methods of trial and procedure may be, without necessarily conflicting with the constitutional provision under consideration, altered from time to time as experience may demonstrate to be desirable. *Hurtado v. California*, 110 U. S. 516, 537; *Holden v. Hardy*, supra; *Reetz v. Michigan*, supra. It may be that originally in England questions of insanity were tried by a jury called for the purpose by the chancellor and it may also be that in some jurisdictions in the United States trials by jury in such cases are required by statute, but the constitutional provision does not prohibit the abandonment of that procedure and the substitution of a trial before a board of experts or before a district magistrate or circuit judge alone.

(3b) The specific objection, and the only objection in this connection, is that Sec. 10 of Act 149, read in connection with Sec. 14, prohibits an application by an inmate, who has become sane, for a hearing to determine the question of his sanity. Sec. 10 reads: "Any person committed to the Insane Asylum may upon application being made by a sheriff, deputy sheriff or by a relative of such person, and notice given to the Superintendent of the Insane Asylum, be examined by the Commissioners as to his or her sanity and if a majority of said Commissioners shall be satisfied that such person is of sound mind or is not dangerous to the public safety, they shall so certify to the Superintendent of the Asylum, and such person shall be forthwith released from custody," and Sec. 14: "No person shall be committed to the Insane Asylum or be discharged therefrom except as herein provided." The petitioner is admittedly not a person within the class referred to in Sec.

In re Atcherley, 19 Haw. 535.

10. He is as yet merely resisting the effort to have him committed. It may be, therefore, that the ruling made in *Territory v. Miguel*, 18 Haw. 402, 404, that constitutional questions raised by persons not affected by the alleged unconstitutionality are not to be considered, applies and renders it unnecessary to consider this particular attack on the constitutionality of the act. See also *Hatch v. Reardon*, 204 U. S. 160. It may also be, as contended on behalf of the Territory and of the County, that the act, properly construed, permits the superintendent of the asylum to discharge persons who have become sane (Sec. 4 provides that the committal shall be “*until he or she shall become sane or shall be discharged as in this act provided*”), and contemplates that upon refusal of the superintendent to discharge under those circumstances the question of the restoration to sanity may be judicially tried upon a writ of habeas corpus. Again, it may be that if any part of the act is unconstitutional it is merely that portion of Sec. 14 which provides that no person shall be discharged from the asylum except as in the act provided, in which event Sec. 10, not being in its terms exclusive, would still be operative and would stand with the remainder of the act, resort to habeas corpus being then clearly possible on the part of an inmate on whose behalf no application had been made by any relative, sheriff or deputy sheriff.

Upon none of these questions, however, do we express any opinion, for even assuming that Secs. 10 and 14 are inseparable and unconstitutional, the remainder of the act should, in our opinion, be sustained. It is, of course, elementary that a part of an act may be void and the other part valid. A “statute may contain some such provisions,” (invalid ones) “and yet the same act, having received the sanction of all branches of the legislature, being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles

In re Atcherley, 19 Haw. 535.

of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other." Cooley, *Constitutional Limitations*, 7 ed., pp. 246, 247. See also *Wellington et al, Petitioners*, 16 Pick. 87, 95, 96; *People v. Briggs*, 50 N. Y. 553, 565, 566, 567. The act under consideration covers two subjects, that of the committal of persons to the asylum and that of the discharge of those so committed. The provisions relating to the first subject, occupying the larger part of the act, are easily separable from Secs. 10 and 14, and are complete in themselves and capable of being executed in accordance with the apparent legislative intent. If Secs. 10 and 14 are void it is as though they had never been enacted and in that event the legality of a detention, continued after an alleged restoration of sanity, would be open to test by habeas corpus.

The reserved questions are answered in the negative.

T. M. Harrison for John Atcherley.

Lorrin Andrews, Deputy Attorney General, for the Territory, and *F. W. Milverton*, Deputy County Attorney, for the City and County of Honolulu (*C. R. Hemenway*, Attorney General, and *J. W. Cathcart*, County Attorney, with them on the brief).

In re O. R. & L. Co., 19 Haw. 544.

IN RE APPEAL OF THE OAHU RAILWAY & LAND
COMPANY FROM AN ASSESSMENT OF STAMP
DUTY BY D. L. CONKLING, TREASURER OF THE
TERRITORY.

ARGUED AUGUST 27, 1909.

DECIDED SEPTEMBER 3, 1909.

WILDER AND PERRY, J.J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF HARTWELL, C.J.

TAXATION—*stamp duty—instrument assessable as agreement, not as mortgage.*

An instrument effectuating a reduction in the rate of interest on bonds secured by an existing mortgage and a change in the optional time of payment and continuing the mortgage as security for the new bonds issued bearing the reduced rate of interest, should be stamped as an agreement and not as a mortgage.

OPINION OF THE COURT BY PERRY, J.

On January 1, 1897, the appellant, the Oahu Railway & Land Co., executed a trust mortgage to secure an issue of bonds in the sum of \$2,000,000 bearing interest at the rate of six per cent. per annum and payable January 1, 1927, with an option to the mortgagor to pay the whole issue after an earlier date named. That mortgage was duly stamped and recorded in the registry of conveyances. On June 26, 1909, the appellant gave notice by advertisement that the entire issue of bonds then outstanding would be redeemed July 1, 1909, and on the same day W. G. Irwin, as underwriter of a new bond issue, gave notice that in accordance with the agreement between the underwriter and the appellant holders of the outstanding bonds might exchange them for bonds of the new issue, paying a stated premium, or might receive cash and accrued interest for the outstanding bonds. On June 29, 1909, in pursuance of notice given on the 26th of that month, the stockholders of the appellant company voted to ratify the action of the board of directors in calling in the outstanding bond issue and in con-

In re O. R. & L. Co., 19 Haw. 544.

tracting for the making and underwriting of a new bond issue, to bear interest at five per cent. for refunding the former, and also voted to authorize the execution of the instrument hereafter referred to as exhibit A. From the proceeds of the sale of the new bonds the old issue is to be paid and canceled, save in so far as an exchange may be made under the offer of the underwriter. The treasurer of the Territory has assessed the stamp duty on exhibit A at the sum of \$5989 on the theory that the instrument is a mortgage and from that ruling the appellant has appealed claiming the duty to be \$1 only on the theory that the instrument is an agreement.

Exhibit A, after reciting the execution of the mortgage of 1897, a change in the personnel of the trustees under the same, the desire of the company to refund the issue of six per cent. bonds by a new issue of five per cent. bonds, the authorization of such change, the fact that the new bonds are in all respects as nearly as practicable identical with the old bonds except that they bear interest at five per cent. per annum in place of six per cent. and that the company has the option of redeeming them on July 1, 1919, or on any interest due date thereafter until maturity, witnesses "that the company in consideration of one dollar * * * paid by the trustees * * * does hereby covenant and agree with the trustees that said trust mortgage * * * shall stand and be security" for the bonds of the new issue; "that said trust mortgage shall not be redeemed or redeemable * * * until all of said bonds shall be fully paid and discharged * * * and that the holders from time to time of the new issue * * * shall have * * * all the rights, privileges and remedies secured to the bondholders under said trust mortgage;" and that "the trustees in consideration of the premises and of one dollar * * * paid by the company * * * do hereby covenant with the company to stand seized" of all the mortgaged property "for the equal protection of all the holders" of the new bonds "upon

In re O. R. & L. Co., 19 Haw. 544.

the same trust with the same powers and subject to the same limitations as are set forth at large in the trust mortgage."

The only question is whether this instrument is, within the meaning of Sec. 1320 of the Revised Laws providing for stamp duties, an "agreement" or a "mortgage or charge on or affecting any lands or property real or personal whatsoever." In our opinion it is an agreement. The language used in *The Appeal of C. Bolte*, 18 Haw. 241, 242, is applicable. "A mortgage is a conveyance of property as security. In this case the mortgage was already in existence and stamp duty had been paid upon it. The instrument in question was not a mortgage. It conveyed no property." It was merely an agreement effectuating a reduction in the rate of interest and a change in the optional time of payment of the debt secured by the mortgage already made and continuing that mortgage as security for the new bonds. The covenant to stand seized does not, as claimed by the treasurer, operate as a conveyance from the appellant. That covenant is by the trustees and not by the original mortgagor and the only mortgage claimed by the treasurer to exist is one from the appellant. The title was in the trustees prior to the execution of exhibit A.

The stamp duty is fixed at \$1.

S. M. Ballou (*Kinney, Ballou, Prosser & Anderson* on the brief) for O. R. & L. Co.

C. R. Hemenway, Attorney General, for the Treasurer of the Territory.

Archer v. Naka, 19 Haw. 547.

FRANK K. ARCHER v. S. NAKA AND J. SAKEHARA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 21, 1909.

DECIDED SEPTEMBER 23, 1909.

WILDER AND PERRY, JJ., AND CIRCUIT JUDGE ROBINSON IN
PLACE OF HARTWELL, C. J.

JUDGMENTS—*estoppel*.

In an action of ejectment a judgment for defendants on demurrer is a bar to a second action for the same piece of land brought by the same plaintiff against the same defendants where the allegations in the complaints in the two actions are the same in all material respects.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment in which defendants pleaded in bar a former judgment sustaining their demurrer to plaintiff's complaint seeking to recover the possession of the same piece of land. The plea in bar having been overruled, defendants bring up an interlocutory bill of exceptions to review that ruling. In allowing such a bill of exceptions it would be better practice if the trial judge certified, as he did not in this case, that in his discretion he thought the same "advisable for a more speedy termination of the case." *Silva v. I. I. S. N. Co.*, 18 Haw. 328, 330.

The law applicable to the merits of the exception is well settled and is clearly stated in *Gould v. Evansville and Crawfordsville R. R. Co.*, 91 U. S. 526, as follows:

"If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; but, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration

Archer v. Naka, 19 Haw. 547.

which is supplied in the second suit, the judgment in the first suit is not a bar to the second."

In this case the plaintiff is again seeking to recover the same piece of land from the same defendants as in the first action. The only question is whether plaintiff has supplied in his complaint in this action essential allegations which were lacking in his complaint in the first action.

The plaintiff in the first action alleged:

"That the Plaintiff is entitled to the possession of that certain piece or parcel of land situated at Kanupoo, Waikele, Ewa, Island and County of Oahu, Territory of Hawaii, by virtue of a lease made by and between Punohu Muir by Frank K. Archer her Attorney in fact and Ah Kai, dated May 1st, 1906 and recorded in Liber 283 on Pages 178 and 179 and duly assigned to the Plaintiff herein a survey of said piece of land is hereto attached and made a part hereof."

That complaint was demurred to on various grounds, among others that it did not state facts sufficient to constitute a cause of action, and the demurrer was sustained and the complaint dismissed.

In the complaint in this (the second) action it is alleged:

"That said Plaintiff claims the possession of the same by virtue of a lease made by and between Punohu Muir by Frank K. Archer her Attorney in fact and Ah Kai, Dated May 1st, 1906, and recorded in Liber 283 on Pages 178 and 179, for 21 and half years from and including the first day of May A. D. 1906, at the annual rental of \$50 for the first one year and half of said term, and at the annual rental of \$120 per year for the balance of the term thereof.

"That said Lease being duly assigned to the Plaintiff herein by Ah Kai, the Lessee therein, by an Assignment dated, Jany. 31st, 1907, and recorded in Liber 294 Page 286.

"That said Lease is still in force between said Punohu Muir and the Plaintiff herein.

"That said Frank K. Archer was duly appointed as an Attorney in fact by said Punohu Muir by a Power of Attorney dated June 27th, 1903, and duly recorded."

Archer v. Naka, 19 Haw. 547.

The other parts of the two complaints are identical. Thus it appears that the additional allegations in the second complaint in brief are the term of the lease, the rental, the date of the assignment and where recorded, the date of the power of attorney to plaintiff and that it was recorded, and that the lease is still in force. All of these averments but the last are clearly but an elaboration of what was alleged in the first complaint and undoubtedly add nothing to it as a pleading in legal effect. It is contended, however, that the allegation in the second complaint that the lease is still in force supplies the necessary averment which was lacking in the first complaint. With that contention we cannot agree. Where one seeks to recover land by virtue of a certain lease an averment that that lease is still in force, while perfectly proper, adds nothing, as a claim under the lease implies that the lease is still in force and that it has not been surrendered or canceled. A comparison of the two complaints shows that they are the same in all material respects. In our opinion the ruling of the trial judge was erroneous, although, as is obvious, we do not mean to intimate that plaintiff may not satisfy the rule of law referred to.

Exceptions sustained.

W. C. Achi for plaintiff.

W. T. Rawlins for defendants.

JAMES W. LLOYD v. TERRITORY OF HAWAII.

ORIGINAL.

TRIED OCTOBER 4, 1909.

DECIDED OCTOBER 4 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

This action has been before this court twice on demurrer, ante, pp. 491, 520. At the trial, after the plaintiff had rested,

Lloyd v. Territory, 19 Haw. 549.

the defendant moved for a nonsuit. The court, through the chief justice, rendered the following oral opinion:

HARTWELL, C.J. It is an important question, not so much on account of the amount claimed, which is, of course, a good deal to the plaintiff, but in view of the practice of bringing to the court claims which have been more or less passed upon by the legislature which the court would have to approach with delicacy and caution. We all recognize that, I think, fully.

I will say further for myself—I will not attempt to speak for my associates—that there is in the plaintiff's claim a certain aspect of merit which has appealed to me, but taking all the facts before us we do not feel at liberty to deny the motion for we think that a ratification of any agreement has not been shown and that the powers of a chairman of a committee, although acquiesced in by his committeemen, so far as they know what he is doing, would not, under the rules of the house, go to the extent of allowing such claims. A board has got to act as a board, a committee as a committee, and while in every legislative body there is a good deal of responsibility assumed by chairmen and the speaker which the house, for its part, and the committee, for its part, know about and, to a certain extent, are presumed to acquiesce in by silence, yet when it comes to the exact powers of those officials, under the rules of the house, we are unable to say that it exists to the extent claimed. So that on the whole we think that it is our duty to grant the motion, which is granted accordingly.

R. P. Quarles for plaintiff.

Lorrin Andrews, Deputy Attorney General, for the Territory.

Estate of Alexandre, 19 Haw. 551.

IN THE MATTER OF THE ESTATE OF JOHN MARQUES ALEXANDRE, DECEASED.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 28, 1909.

DECIDED OCTOBER 6, 1909.

HARTWELL, C.J., WILDER, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF PERRY, J.

DOWER—*mutual benefit society fund.*

Under the by-laws of a mutual benefit society a member could designate to whom after his death it should pay a donation fund. The decedent directed it to be paid to his executor for the benefit of his estate. Held, the widow has no statutory dower in this fund although a part of the estate of the decedent.

OPINION OF THE COURT BY HARTWELL, C.J.

The material facts upon which the questions of law were reserved are as follows: The decedent, as a member of a Portuguese benevolent society, was entitled under its by-laws to designate by will or by declaration filed with its executive council the persons to whom, upon his decease, certain moneys collected by the society from its members, called in its by-laws a donation, should be paid by the society, the by-laws providing that "for all légal purposes the donation * * * is not considered as assets of the estate of the deceased." The testator in his will directed that all moneys becoming due at his decease from the society should be paid to his executor for the benefit of his estate, giving his wife "the sum of one dollar as and for her full share in any personal property of whatever nature or description I may die possessed of." Upon the decedent's death the sum of \$1678 was paid by the society to the executor. The will, after a few small legacies, made the testator's daughter his residuary legatee.

The questions reserved are (1) "Is the sum of one thousand six hundred and seventy-eight (\$1678.00) dollars so held

Estate of Alexandre, 19 Haw. 551.

a part of the estate of John Marques Alexandre, deceased,"
(2) "Has the widow, Minnie Marques Alexandre a dower interest in said fund?"

The statute, Sec. 2271 R. L., enacts that the widow, in addition to dower in her husband's land, "shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession or reducible to possession, at the time of his death, after the payment of all his just debts." The money in question was not personal property of the decedent nor any part of his movable effects in possession or reducible to possession by him at the time of his death, nor was it subject to any disposition other than that which he should direct by will or written declaration to the society. The direction in the will excludes the widow from any share, other than one dollar, in any of the testator's personal property. It is to be inferred that the testator intended to exclude her from sharing in this donation as well as in other property of which he should die possessed. Although she would not be deprived of her right by way of dower in other personal property the direction may be treated as effective with reference to the donation. The executor is the one who was designated to receive the donation fund and he should distribute it as provided in the will which, while making it a part of the estate, precludes the widow from sharing in the fund beyond the amount indicated.

The first of the reserved questions is answered in the affirmative and the second in the negative.

E. C. Peters for the widow.

Judd & Lindsay for the executor.

Thompson & Clemons and *A. D. Larnach* for legatees.

Scott v. Pedro, 19 Haw. 553.

M. F. SCOTT v. JOE MARIA ALIAS JOE MARIA
PEDRO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 27, 1909.

DECIDED OCTOBER 8, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

BILLS AND NOTES—*liability of indorser—statute of limitations.*

One who indorses a sight draft with notice of its dishonor becomes liable to his indorsee on delivering the draft and the statute of limitations then starts running.

OPINION OF THE COURT BY WILDER, J.

The previous history of this case is to be found ante, p. 389. A new trial having been had jury waived, the court made certain findings of fact from which it concluded that the action was barred by the statute of limitations and rendered judgment accordingly. The plaintiff brings exceptions, admitting that the facts as found cannot now be disturbed, but claiming that the conclusion from those facts was erroneous.

This action was brought December 24, 1907, and the draft, for the indorsement of which defendant was sued, was dated September 30, 1901, the indorsement by defendant and the delivery to plaintiff having taken place in the early part of December, 1901. The statute of limitations started running in favor of defendant whenever he became liable on his indorsement. The trial court found that defendant undertook to pay the draft if plaintiff was unable to secure payment of the same from the maker. We are inclined to think that this finding only means that the obligation of the defendant in indorsing and delivering the draft to plaintiff was that which followed as a matter of law from his acts, namely, the ordinary obligation of an indorser, as there is no evidence to sustain a finding that defendant assumed any additional obligation.

Scott v. Pedro, 19 Haw. 553.

Prior to the delivery the draft had been dishonored, which fact was known to all the parties. As we have already held, ante, p. 389, that a second presentment was unnecessary in order to hold defendant, nothing remained to fix defendant's liability, and it follows that he became liable immediately on delivering the draft to plaintiff. That occurred in the early part of December, 1901, which was more than six years before this action was instituted. Therefore we are of the opinion that the trial court was correct in its conclusion that the action was barred by the statute of limitations.

Finding no error the exceptions are overruled.

Plaintiff in person.

C. F. Peterson for defendant.

B. F. DILLINGHAM v. M. F. SCOTT; KONA DEVELOPMENT CO., LTD., AND F. B. McSTOCKER, GARNISHEES.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 27, 1909.

DECIDED OCTOBER 11, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

PLEADING—*sufficiency of allegation.*

The declaration held to sufficiently allege (a) an express promise by an accommodation party to a promissory note to save the other accommodation party harmless in the transaction and (b) a consideration for the promise.

TRIAL—*instructions.*

A party cannot be heard to complain of the giving of instructions requested by himself.

When the law is sufficiently stated in the instructions given, the refusal of additional instructions is not error.

FRAUDS, STATUTE OF—*promise to save harmless.*

The promise to save the maker of a note harmless from any claim on the note is an original undertaking and not within the statute of frauds.

Dillingham v. Scott, 19 Haw. 554.

OPINION OF THE COURT BY PERRY, J.

This case has been before this court on writ of error, the judgment rendered, jury waived, for the plaintiff being reversed and a new trial ordered. Ante, p. 421. At the second trial the jury rendered a verdict for the plaintiff and the case now comes for review on exceptions.

On the writ of error this court stated the question then before it to be "whether the accommodated party on whom the law casts the obligation to reimburse the accommodation party is necessarily the party whose debt is paid with the note or its proceeds or whether it may be shown by oral testimony to be some other party who requested the transaction to be made and who received an indirect benefit from it"; and, observing that "a person may be accommodated within a broad use of that term without being the accommodated party in the legal sense," and regarding the evidence upon the material matters as undisputed, held that "the accommodated party upon whom the law casts the implied obligation of reimbursing the accommodation party is the party who, in accordance with the prior understanding of the parties, receives the direct benefit of the accommodation paper or its proceeds, and that this result follows even though * * * the motive actuating the accommodation maker was wholly the desire to accommodate some other party requesting the loan of credit," and, more specifically, that "the plaintiff and the defendant were both accommodation parties and the Kona Sugar Co., Ltd., was the accommodated party and the only party under implied obligation to reimburse the accommodation maker." It added, however, that "it is true that between accommodation parties, one of whom has paid the note, parol evidence of an express contemporaneous agreement that their liability shall be different from that expressed on the face of the paper is admissible and that plaintiff may recover on such express contract if

Dillingham v. Scott, 19 Haw. 554.

proved"; and since the case "was apparently not tried and certainly not decided upon this theory" this court refused to pass "in the first instance on the question whether the evidence would support a finding of such express contract," and therefore make the order for a new trial.

At the new trial the plaintiff presented, without any amendment to the declaration, the claim that there was an express contemporaneous agreement different from that set forth on the face of the note. The first question raised by the exceptions is whether under the declaration evidence of such express contract was admissible,—whether, in other words, the declaration set forth a cause of action based upon such promise.

The declaration alleges that the plaintiff executed and delivered to the defendant the promissory note in question, describing it; that the note, "although purporting on its face to be for a valuable consideration, was wholly without consideration and for the purpose of enabling said defendant to obtain the sum of money in said promissory note set forth for his own use and benefit, said promissory note having been executed and delivered as aforesaid by said plaintiff for the accommodation of the defendant;" that at the time of the delivery of the note the defendant in consideration of its execution and delivery "promised and agreed with the plaintiff that he would pay to the holder of said promissory note at maturity the amount due thereon and save plaintiff harmless from any claim or demand thereon;" that before maturity the note was transferred for value by defendant to H. Hackfeld & Co., Ltd.; that at maturity Hackfeld & Co. was its bona fide holder for value; that the defendant wholly failed to pay the note and that plaintiff was required to and did pay the whole of its amount to Hackfeld & Co.; and that upon demand defendant has failed to reimburse the plaintiff.

Reading the language of the declaration in its ordinary meaning an express promise on defendant's part to pay the

Dillingham v. Scott, 19 Haw. 554.

note at maturity and to save the plaintiff harmless is sufficiently averred, nor is the effect of this allegation destroyed by the further averment that the note was executed and delivered "for the accommodation of the defendant." The word "accommodation" may properly be regarded as having been used in this connection in its popular as distinguished from its technical meaning. So also it sufficiently appears that the consideration for the defendant's promise to save harmless was the plaintiff's execution and delivery of the note, acts which subjected the plaintiff to the risk of being compelled, under certain circumstances, to pay the note if it was specifically transferred by the defendant for value, as it was intended by the parties to be; and, on the other hand, the consideration for the plaintiff's execution and delivery of the note was the defendant's promise to hold him harmless. Evidence of an express promise was admissible.

The next question is whether the plaintiff so conducted the trial as to violate in the presentation of evidence or in his statements in the presence of the jury or otherwise the spirit of the former decision of this court. After a careful examination of the record we find no such violation. While the word "accommodation" was used a few times by counsel and witnesses in the course of the testimony it was evidently used in its popular sense and its use could not have been prejudicial to the defendant. The case was presented by the plaintiff on the sole contention that an express oral contract was made by the defendant to save plaintiff harmless and no reliance was had by the plaintiff or could properly have been understood by the jury to have been had by him upon the theory of an implied obligation on the part of the defendant as the accommodated party. The instructions likewise, in so far as the plaintiff requested them, omitted all reference to the theory of any such implied obligation on the part of the defendant. Considerable was, indeed, said by the court to the jury on the

Dillingham v. Scott, 19 Haw. 554.

subject of the liability of makers and indorsers of notes and of accommodation paper, accommodation parties, and accommodated parties, but with slight exceptions in the form of modifications of original requests all of this was said at the express request of the defendant himself. All of these instructions requested by the defendant should have been refused and the subject covered with a short statement expressly excluding its consideration by the jury and defining the sole issue to be whether or not the express oral contract had been made. The defendant, however, cannot now be heard to complain that the subject was discussed in the instructions.

Some of the instructions requested by the defendant were modified and others refused, but as given they do not, as is now contended by the defendant, leave it to the jury to determine who was the accommodated party or to find against the defendant upon an implied obligation as the accommodated party.

Some only of the rulings of the trial court on the instructions will be specifically referred to. Defendant's requested instruction No. 6 was "If you find from the evidence that the note in question was given to pay a debt of the Kona Sugar Company, Limited, so understood by the parties at the time of its execution or if it was stated by defendant to plaintiff at the time, and if the paper was so used as intended, I then instruct you that the note was an accommodation note, that the plaintiff B. F. Dillingham was the accommodation maker, that defendant M. F. Scott was the accommodation indorser and that the Kona Sugar Company, Limited, was the accommodated party. I further instruct you that between accommodation parties themselves, plaintiff and defendant, the note itself shows a contract in writing, of a primary obligation of plaintiff to pay and that payment by plaintiff discharged the liability of defendant and that if defendant had paid the note he could in turn have recovered on the contract of the note

Dillingham v. Scott, 19 Haw. 554.

from plaintiff." This was modified by the addition at the end of the words "unless at the time it was executed the parties had an agreement different from that represented by the position of their respective names on the note," and by the insertion after the words "I then instruct you," in the early part of the instruction, "that if you find from the evidence." The first modification was unobjectionable. The other rendered the whole instruction at least ambiguous and perhaps meaningless, and yet the error was cured by the giving of other instructions substantially to the same effect as this one in its original form. For example, in defendant's Nos. 8, 12 and 15 the court instructed the jury as follows: "A party may be accommodated by the use of accommodation paper, within a broad sense of that term, without being the accommodated party in the legal sense. If you find from the evidence that defendant was the creditor of the Kona Sugar Company, and may have been accommodated and benefited by having the debts of said Company due Hackfeld & Company, paid, yet such accommodation creates no obligation of the party so accommodated to reimburse the accommodation party who may have been obliged to pay the note." "If you find from the evidence, that the note in question was negotiated for the benefit of the Kona Sugar Company, Limited, with the knowledge and acquiescence of the parties whose names are thereon, and that the proceeds thereof were applied to payment of claims against said Company, then in the absence of any agreement to the contrary the Kona Sugar Company, Limited, was in contemplation of law the accommodated party, and the party whose obligation it was to preserve the accommodation parties indemnified from loss. The note shows evidence, and is evidence of a contract in writing, that the plaintiff was the primary obligor, and if the plaintiff has paid the note he cannot recover from the defendant obligor even in an action, not on the note, if they were not in fact joint obligors, nor in fact made any

Dillingham v. Scott, 19 Haw. 554.

collateral contract whatever as to their liability. Therefore unless you find satisfactory evidence of a collateral agreement made at the time the note was executed that the liability of the obligors was different from that indicated by the position of the respective names on the note, then you must find a verdict for the defendant." "Unless you are satisfied by a preponderance of satisfactory evidence that at the time the note was executed, the plaintiff and defendant had an agreement by and between themselves different from that expressed in the note itself, you must find a verdict for the defendant." The giving of these instructions likewise cured any error that might otherwise have occurred in the refusal of defendant's requests Nos. 10, 11 and 13, and the modification of No. 14.

It is further contended by the defendant that the instructions given were erroneous in omitting any reference to the defense of the statute of frauds and in permitting the plaintiff to recover upon the alleged oral contract irrespective of whether or not the promise made was original or collateral. It may be noted in passing that this defense was not pleaded and that no request was made for any instructions on the point. The only mention of the subject made in the proceedings below was by way of an objection to the admission of evidence of the oral contract. Whether this defense was properly available at the trial need not be determined in view of our conclusion upon its merits. The contemporaneous oral agreement, if any, proven by the evidence was that the defendant would save the plaintiff harmless if the plaintiff should by reason of the execution and delivery of the note be required to pay the same, and under the instructions the jury was not given liberty to find for the plaintiff unless they found that this promise was made. Upon any other state of facts, as found by the jury, the latter was instructed in effect to find for the defendant. Such an agreement, made by the defendant to the plaintiff, was an original undertaking and was not a promise to

Dillingham v. Scott, 19 Haw. 554.

pay the debt of another. See 29 Enc. L. 912; *Wildes v. Dudlow*, L. R. 19 Eq. Cas. 198, 201; *Hackfeld v. Wilson*, 13 Haw. 212; *Castle v. Smith*, 17 Haw. 32, 37-40. The Kona Sugar Co. did not owe any debt to the plaintiff. The defendant's promise was to pay to the plaintiff and not to H. Hackfeld & Co., to whom the Kona Sugar Co. was indebted. Ordinarily to bring a promise of this nature within the statute it must be made to the person entitled to enforce the liability assumed by the promisor. *Merchant v. O'Rourke*, 111 Ia. 351, 355; *Tighe v. Morrison*, 116 N. Y. 263, 270. Under the sole issue submitted and the finding made, credit was extended by the plaintiff to the defendant alone and not to the Kona Sugar Co.

It may be added that there was evidence sufficient to sustain a finding that a contemporaneous oral agreement was entered into as claimed by the plaintiff.

The exceptions are overruled.

M. F. Prosser and *W. B. Lymer* (*Kinney, Ballou, Prosser & Anderson* on the brief) for plaintiff.

M. F. Scott, defendant, in person.

TERRITORY OF HAWAII, BY C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, v. MELLIE E. HUSTACE, FRANK HUSTACE, HER HUSBAND; TERRITORIAL HOTEL COMPANY, A CORPORATION; ALEXANDER YOUNG, TRUSTEE; BATHSHEBA M. ALLEN; AND MARK P. ROBINSON, JOSEPH O. CARTER, PAUL MUHLENDORF AND BATHSHEBA M. ALLEN, TRUSTEES OF THE ESTATE OF S. C. ALLEN.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 6, 1909.

DECIDED OCTOBER 11, 1909.

Territory v. Hustace, 19 Haw. 561.

HARTWELL, C.J., WILDER AND PERRY, JJ.

INJUNCTION—*obstruction in highway.*

Where title in land claimed as a public highway is also claimed by defendants equity will not enjoin an obstruction of its use for a highway, there being no "strong and imperious necessity" in the case until the title is adjudicated at law.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal from a decree sustaining defendants' demurrer and dismissing the plaintiff's bill. The demurrer that the bill is uncertain and does not state facts sufficient to constitute "a cause of action," is general in its nature, to be treated as a demurrer for want of equity. *Love v. Commissioners*, 64 N. C. 706; *Chesney v. Rodgers*, 1 Heiskell (Tenn.) 239; 1 Beach, Eq. Pr., 271; 1 Daniell, Ch. Pr. 5 ed., 586. We therefore do not pass upon the defect suggested in argument, namely, that acts or conduct are not specified which constitute dedication of a public highway.

The bill alleged that in April, 1880, King Kalakaua became owner of the strip of land in question and in January following, while its owner, and in its possession, control and occupation, "dedicated the same to the public to be used as a public highway between the said Waikiki road and the sea beach, the said strip or parcel of land was then and there designated as Kaiulani road;" that thereafter from the year 1891 until about November, 1893, the road was recognized by the government and was continuously used by the general public as a public highway; that November 20, 1893, defendant Frank Hustace quitclaimed to Peacock, predecessor in interest of the defendant Hotel Co. and Young, trustee, a certain portion of the land and about the same time he and his wife, the defendant Mellie E. Hustace, excluded the public from any use of the road and caused fences to be erected across the road and obstructed it and prevented its use as a highway, while Pea-

Territory v. Hustace, 19 Haw. 561.

cock, assuming to claim under the quitclaim from Hustace, constructed fences and other structures within that portion of the road described in the quitclaim deed and thereby prevented its use as a public highway, which fences and other structures were, at the time of the filing of the bill and for sometime previous had been, maintained by the Hustaces, the Hotel Co. and Young, trustee, and constitute a public nuisance, the other defendants claiming as mortgagees of that portion of the road not included in the part quitclaimed to Peacock. The bill was brought May 29, and the demurrers filed Jan. 7, June 26 and August 7, 1906, the decree appealed from being taken August 23, 1909.

An insuperable difficulty in the plaintiff's case is that the title to the land claimed as a public highway is also claimed by the defendants and requires to be adjudicated at law, the plaintiff's case not being "one of strong and imperious necessity," having stood for many years without assertion of claim by the Territory. *McBryde Sugar Co. v. Koloa Sugar Co.*, 19 Haw. 106, 118. See also *Wundenberg v. Markham*, 14 Haw. 168; *Erhardt v. Boaro*, 113 U. S. 537; *Lacassagne v Chapuis*, 144 U. S. 119, and *Spelling on Injunctions*, § 368.

The decree appealed from should, however, be modified so as to provide that the bill is dismissed without prejudice.

Lorrin Andrews, Deputy Attorney General (*C. R. Hemenway*, Attorney General, with him on the brief), for plaintiff.

A. S. Humphreys (*Holmes, Stanley & Olson* with him on the brief) for defendants.

Kane v. Medeiros, 19 Haw. 564.

WILLIAM KANE v. JOE MEDEIROS, GUARDIAN OF
CAESAR LOPES AND RICHARD LOPES, MINORS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 6, 1909.

DECIDED OCTOBER 11, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

GUARDIAN AND WARD—*promise to pay ward's debts.*

A guardian's promise to pay ward's debts, incurred prior to his appointment, being without consideration, is not actionable.

OPINION OF THE COURT BY HARTWELL C.J.

The plaintiff was nonsuited upon a showing made by his evidence that he had furnished board and lodging to the minors prior to the appointment of the defendant as guardian and that after the appointment the defendant promised to pay the plaintiff therefor, the complaint alleging that the "defendant is indebted to the plaintiff in the sum of forty-two dollars for boarding and lodging said minors," and that "in consideration whereof said defendant promised to pay said sum to plaintiff." But the defendant was not indebted as alleged; it was the minors, if any one, who were indebted for necessities. The action therefore does not lie against the guardian since the evidence shows there is no legal consideration for his promise.

If the debt is due from the minors and their estate should justify the guardian in making the payment and he should make it his accounts would undoubtedly be allowed in probate. The statute requires the guardian to "pay all just debts due from the ward out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as hereinafter provided." Sec. 2313 R. L. But the

Kane v. Medeiros, 19 Haw. 564.

remedy for his failure to do this would not be an action against him in the present form.

Exception to nonsuit overruled.

W. C. Achi for plaintiff.

C. H. Olson (Holmes, Stanley & Olson on the brief) for defendant.

No. 7. D. L. LEVI ALIAS LEVI MAHIAI v. MAKALEI (k). Exceptions from Circuit Court, Second Circuit. Submitted October 9, 1909. Decided October 12, 1909. Hartwell, C.J., Wilder and Perry, J.J. Per curiam. The defendant excepted to the denial of his motions for a nonsuit and new trial, based upon his claim that the land was not identified. There was ample evidence by witnesses who were familiar with the land and its location and of the possession and cultivation by the plaintiff and his father for over twenty years, and of the present possession and ouster by the defendant. "One with knowledge, even though not a surveyor, may testify to such facts." *O. R. & L. Co. v. Armstrong*, 18 Haw. 260.

Exceptions overruled.

D. H. Case for plaintiff.

Viras & Correa for defendant.

TERRITORY OF HAWAII v. LAM YIP KEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 8, 1909.

DECIDED OCTOBER 18, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

COMMERCE, INTERSTATE—*original packages*.

Defendant received in Honolulu a consignment from California of five wooden cases each addressed to him and each containing

Territory v. Lam Yip Kee, 19 Haw. 565.

five tins, each of the latter in turn containing twenty 5 tael tins of opium. Each of the 5 tael tins bore the marks and stamps placed on them by the custom house officer at San Francisco upon the original importation from Hong Kong, as required by treasury regulations. Held, under the decisions relating to the interstate commerce clause of the constitution, the wooden cases and not the 5 tael tins were the "original packages."

OPINION OF THE COURT BY HARTWELL, C.J.

The defendant, being charged with having sold opium unlawfully in Honolulu April 30, 1909, in violation of the provisions of Sec. 1399 R. L., was found guilty and sentenced to a fine of \$50 and costs. He is shown to have sold a 5 tael tin of opium received in a consignment to him from San Francisco of five large wooden cases each addressed to him and each containing five tins with twenty of the 5 tael tins in each, so that each case contained one hundred 5 tael tins. The cases were originally shipped by a Chinese firm in Hong Kong to one Playfair in San Francisco and purchased by the defendant from a San Francisco Chinese firm, purchasers probably from Playfair. Upon receiving the consignment the defendant opened one of the wooden cases and removed therefrom the 5 tael tin. Each 5 tael tin had affixed thereon a custom's stamp as required by Art. 311 Customs Reg. of 1908 relative to foreign importations showing date of importation, March 23, 1909; name of importer, Playfair; of the vessel, S. S. China; port of entry, San Francisco; officer's signature, J. N. Thornton, with the printed words "duty paid." The stamp was affixed in such manner that it would be broken or defaced on opening the tin.

The defendant's exceptions relate to his claim that the 5 tael tin was an original package, recognized and treated as such by U. S. Custom House officers acting under regulation made pursuant to an act of congress, and therefore that its sale in that form could not constitutionally be prohibited in California or

Territory v. Lam Yip Kee, 19 Haw. 565.

prevented by any law of Hawaii from becoming an article of interstate commerce.

The wooden case of opium imported into San Francisco was the package which was shipped at Hong Kong whatever was done with it and its enclosed containers by custom's officials, unless the regulation requiring before delivery to the importer of any opium prepared for smoking, "each 5 tael box or other package of the merchandise as imported" shall be stamped and marked, changed the nature of the original package. We do not consider that this was the intention or legal effect of the treasury regulation. The opening of the cases by the custom house officials and stamping the smaller containers enclosed therein did not make any of the smaller containers original packages within the meaning of law and under the decisions relating to the interstate commerce clause of the constitution. *Brown v. Maryland*, 12 Wheat. 419; *Low v. Austin*, 13 Wall. 29; *Leisy v. Hardin*, 135 U. S. 100; *Vance v. Vandercook Co.*, 170 U. S. 438; *Am. Steel & Wire Co. v. Speed*, 192 U. S. 500; *Austin v. Tennessee*, 179 U. S. 343; *Cook v. Marshall County*, 196, U. S. 261.

Exceptions overruled.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney with him on the brief), for plaintiff.

E. A. Douthitt for defendant.

Ah Hoy v. Raymond, 19 Haw. 568.

JIM AH HOY *v.* J. H. RAYMOND.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 1, 1909.

DECIDED OCTOBER 22, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CONTRACTS—*construction.*

Under the agreement, mentioned in the opinion, the plaintiff was not a purchaser from the defendants, but merely their agent to sell beef furnished.

EVIDENCE—*inadmissible to contradict writing.*

In an action at law an instrument purporting to be an absolute assignment can not be shown by parol evidence to have been intended as collateral security only.

JURY—*instructions, ownership.*

When the question of ownership is one of mixed fact and law, its submission to the jury should be accompanied with instructions giving specific definitions of ownership applicable to any findings of facts which the evidence may justify.

DEEDS—*recital of consideration.*

A recital of consideration in a bill of sale can not in the absence of fraud or mistake be contradicted between the parties for the purpose of defeating the operation of the instrument.

FRAUD—*defense at law.*

When in an action at law a party relies upon a bill of sale, the defense that it was obtained by fraud is available to the other party.

CONVERSION—*demand and refusal.*

In an action for conversion of personal property, demand and refusal is necessary when the original taking is lawful, but not when it is wrongful or there is an illegal assumption of ownership or an illegal user.

OPINION OF THE COURT BY PERRY, J.

Plaintiff claims damages, charging that the defendants unlawfully entered certain premises of the plaintiff situated at Wailuku, Maui, took and converted to their use certain hogs,

Ah Hoy v. Raymond, 19 Haw. 568.

horses, wagons, weighing machines and other property used by the plaintiff in conducting the business of buying, selling and slaughtering beef cattle and other animals, and excluded the plaintiff from said premises and business and assumed absolute control of the same. At the close of the plaintiff's evidence a nonsuit was granted in favor of the Waterhouse Trust Co., Ltd., and subsequently a jury rendered a verdict for the plaintiff for \$2500 against the remaining defendant. Defendant excepts.

At the trial the theories of the parties concerning their respective rights under certain instruments introduced in evidence were widely divergent. A consideration of these instruments will dispose of the main issues in the case. On August 1, 1905, plaintiff and the defendants, James H. Raymond and Phoebe K. Raymond, entered into an agreement in writing whereby the defendants agreed to furnish to the plaintiff beef cattle for a period of five years "to be sold for them in Wailuku on Market street at the place where the" plaintiff "is now located on the following conditions," to wit: "That the number of cattle required are to be delivered each day during the term of this agreement; the dressed weight to be taken on the day of slaughtering by an agent of the party of the first part; that the business of retailing shall be under the supervision of the party of the first part, or their agents; that all cattle belonging to the party of the first part, and kept in their pens in Wailuku, Maui, are to be cared for in a proper manner by the party of the second part by giving them food and water as often as may be required, the party of the first part to pay for all food so purchased at market prices." Further provisions are: "That the commissions to be paid to the party of the second part (the plaintiff) for selling the beef shall be all realized above" certain stated rates per pound for the dressed beef; "the party of the second part acting as agent for the party of the first part shall keep all accounts properly and shall deposit all moneys re-

Ah Hoy v. Raymond, 19 Haw. 568.

ceived from day to day from the proceeds of the sale of beef, hides, tallow, etc., in the First National Bank of Wailuku to the credit of the party of the first part; that all outstanding accounts shall be the property of the party of the first part, only to such extent as shall together with the cash receipts realized from the sale of beef hides, tallow, etc., each month, represent the equity of the party of the first part, viz.: the value of the total number of pounds of dressed beef at the prevailing rate as aforesaid stated; settlement to be made on the 15th of each succeeding month.

"The party of the second part agrees to engage in no other business in Wailuku (the sale of pork excepted); and that he shall personally cut the meat and sell at retail in the premises now occupied by him under a lease held by one Quai Lee, situated on Market street in Wailuku, Maui; and that he will not engage in the cutting and selling of meat for himself or any other party without the consent of the party of the first part in writing.

"That all outstanding accounts for beef, hides and tallow sold as they become due shall be turned over to the party of the first part or their agents; that when the party of the first part shall have been paid in full as per the monthly settlement hereinbefore mentioned, then the surplus if any shall become the property of the party of the second part."

This was not an agreement of sale and purchase. Under its terms the plaintiff merely became the agent of the defendants to sell *for them*, as the instrument plainly states, the beef furnished by the defendants. The animals and carcasses delivered at the slaughter house and butcher shop used by the plaintiff continued the property of the defendants. Even the cash proceeds of the daily sales of beef were the property of the defendants as were also all collections from outstanding accounts and it was only the excess remaining on the 15th of each month above the value, at the prescribed rates, of the beef furnished during the preceding month by the defendants to the plaintiff that upon each such settlement became the property of the

Ah Hoy v. Raymond, 19 Haw. 568.

plaintiff by way of *commissions* for his services in cutting and selling the beef, in caring for the animals and in doing the other acts required of him by the agreement. Upon the faithful performance of his part of the contract the plaintiff was entitled to receive from the defendants the beef cattle for the period named and the commissions specified; and on the other hand upon breach by him of the agreement the defendants were entitled to terminate it and to discontinue the supply of cattle.

The sale of beef was had upon premises held under lease by one Quai Lee from one Sousa. That lease Quai Lee assigned in writing to defendant James H. Raymond on August 31, 1905. Over defendants' objection parol evidence was admitted tending to show that the assignment was "as security only" for the due payment, presumably, to the defendants of the proceeds of the cattle, and the instructions given on this subject left the jury at liberty to find that the assignment was inoperative as such if it should find from the evidence that the assignment was in truth "as security only." In this there was error. Such an instrument cannot in an action at law be shown by parol evidence to have been intended only as collateral security. The remedy is in equity. *Okuu v. Kaiaikawaha*, 7 Haw. 312; *Harper v. Ross*, 10 Allen 332; *Pennock v. McCormick*, 120 Mass. 275; Jones Chattel Mortgages Sec. 21; 3 Devlin Deeds, 2d ed. Sec. 1136. Defendants were entitled to the direct instruction requested (No. 16) to the effect that the assignment of the lease passed the legal title and right of possession of the market premises to J. H. Raymond and to the further instruction (No. 17) that the plaintiff's right to be upon the market premises was wholly dependent upon his complying with the terms of the agreement of August 1, 1905, and that in case of violation by him of those terms Raymond could lawfully exclude him therefrom.

Any definition in the instructions of the term "business" as describing the aggregate of the property used by the plaintiff

Ah Hoy v. Raymond, 19 Haw. 568.

and claimed to have been taken by the defendants would be misleading and unnecessary. In the ordinary acceptation of the term the plaintiff was not the owner of the "business" of slaughtering cattle and selling beef. It would be sufficient and safer to define the precise rights of each of the parties concerned in the agreement of August 1, 1905.

Certain instructions were also given as to what the result should be if the jury should find from the evidence, in one instance, "that the defendant J. H. Raymond was the owner" of the property in question and in another instance that "Jim Ah Hoy was the owner of said property." No instruction, however, was given defining what would constitute ownership nor did these instructions recognize the possibility of a finding of ownership in plaintiff as to certain of the property and ownership in the defendants as to certain other of the property. When, as in this case, the question of ownership is one of mixed fact and law its submission to the jury should be accompanied with instructions giving specific definitions of ownership applicable to any findings of fact which the evidence may justify.

Another writing admitted in evidence was a bill of sale from plaintiff to the Henry Waterhouse Trust Co., Ltd., as trustees for J. H. and Phoebe K. Raymond dated November 23, 1905, whereby "25 hogs, 6 horses, 1 ice box, 1 safe, 2 scales, 3 wagons, 1 buggy, 1 two-wheeled cart, also all pig pens and paraphernalia used in connection therewith" were sold. The instrument recites a consideration of \$810. Plaintiff sought to avoid its effect by introducing parol evidence, which was admitted, tending to show (1) absence of consideration and nonpayment and (2) that his signature was obtained by misrepresentation by Raymond as to its contents. The evidence relating to the consideration was inadmissible. Although there are certain collateral purposes for which a recital of consideration can be contradicted it cannot, even in equity, in the absence of fraud or mistake be contradicted between the parties in order to de-

Ah Hoy v. Raymond, 19 Haw. 568.

feat the operation of the instrument. *Kanakanui v. Leslie*, 7 Haw. 223, 225; *Morris v. Petero*, 4 Haw. 23, 27; *Finn v. Hempstead*, 24 Ark. 111, 119; *Bank v. Watson*, 13 R. I. 91, 95; *Bever v. North*, 107 Ind. 544, 547; *Connor v. Follansbee*, 59 N. H. 124, 125; *M'Calla v. Bane*, 45 Fed. 828, 839; *Finlayson v. Finlayson*, 3 L. R. A. 801, 806 (Or.); *Feeney v. Howard*, 4 L. R. A. 826, 828 (Cal.) The evidence tending to show fraud, however, was correctly admitted. This defense was available at law, even though it was also available in equity. See *Kamohai v. Kahele*, 3 Haw. 530, 534, 535; *Swayze v. Burke*, 12 Pet. 11, 22, 23; *Ins. Co. v. Bailey*, 13 Wall. 616, 622, 623; *Ins. Co. v. Smith*, 73 Fed. 318; *Moore v. Munn*, 69 Ill. 591, 595.

The agreement of August 1, 1905, permitted the plaintiff to engage in the business of selling pork but did not authorize him to conduct such business on the premises described in the Quai Lee lease. Defendants, however, orally consented that the plaintiff sell pork on the latter premises. Defendant's instruction (request No. 15) that Raymond could terminate this privilege at any time without thereby rendering himself liable to damages should have been given without modification. Of the personal property claimed to have been converted by the defendant some was taken under claim of ownership under the bill of sale, and the evidence would perhaps justify a finding of the taking of other articles not prescribed in the bill of sale. There was also evidence tending to show that the defendant had sold some of the property taken and had retained the proceeds. Another point discussed on these exceptions is as to the necessity of demand and refusal. The law may generally be stated to be that where the original taking is lawful a demand and refusal must be shown as evidence of a disposition to convert to the holder's own use or to divest the true owner of his property; but where the taking itself is wrongful or there is an illegal assumption of ownership or an illegal user a demand

Ah Hoy v. Raymond, 19 Haw. 568.

and a refusal need not be proved. *Strauss v. Schwab*, 16 So. (Ala.) 692; *Daggett v. Gray*, 40 Pac. (Cal.) 959, 960; *Carleton v. Lovejoy*, 54 Me. 445.

Other questions are presented by the exceptions. Of these some may not arise again and others may arise under different circumstances. They will not be passed upon at this time.

The verdict is set aside and a new trial is granted.

F. W. Milverton (*Cathcart & Milverton* on the brief) for plaintiff.

A. G. M. Robertson for defendant.

No. 12. ESTATE OF M. V. HOLMES v. FUJITANI. Appeal from District Magistrate, Hamakua. Submitted October 22, 1909. Decided October 23, 1909. Hartwell, C. J., Wilder and Perry, JJ. Statement of case. It is averred in the complaint that about February 28, 1906, "an account was stated by and between plaintiff and defendant whereby it was found that the defendant was indebted unto the plaintiff in the sum of \$220.69 as balance due for goods, wares and merchandise sold and delivered by plaintiff to said defendant at defendant's special instance and request, at divers times and dates prior to and including the said 28th day of February, 1906," the complaint being accompanied by an affidavit of the plaintiff's manager "that the above account is just, true and correct; that all the goods have been delivered; that it is due, and that all just and lawful offsets, payments and credits have been allowed." The defendant filed an answer in which he "pleads the general issue," with his affidavit that no accounting had been had between the plaintiff and himself February 28, 1906, or at any other time; that the amount alleged to be due "is incorrect and unjust as all lawful offsets, payments and credits have not been allowed," and that if he "is indebted to the plaintiff in any sum he is unable to so state," and leaves

Estate of Holmes v. Fujitani, 19 Haw. 574.

the plaintiff to his proofs; demands an itemized account and statement of dates when he incurred the indebtedness. The plaintiff thereupon filed a plea that the defendant "ought not to be allowed to interpose the general issue" as for two years he had "not at any instance disputed the said amount," and asking, therefore, that the answer be set aside and for judgment, accompanying the plea with an affidavit of the manager that the defendant was indebted to M. V. Holmes, at the time of Holmes' death, in the sum of \$370.69; that the manager often went to see the defendant to collect the same and in the latter part of 1905 that the defendant acknowledged the indebtedness and paid thereon \$150, leaving a balance of \$220.69, and that early in 1906 the defendant again acknowledged the debt and promised to pay it; also affidavit of an employee of the plaintiff that he had often presented bills for the amount in question to the defendant who had not "at any instance disputed the said amount." The defendant then filed his sworn statement that no demand had been made upon him by the plaintiff or any one else for the previous two years or more; that no accounting was ever had between them or opportunity given him either to affirm or deny plaintiff's claim, therefore praying that the plaintiff be required to establish his claim. The magistrate sustained the plaintiff's motion to strike out the plea of general issue and gave judgment for plaintiff for the amount claimed with costs, denying motion in arrest of judgment. The defendant appealed upon the point of law, in substance, that the magistrate erred in granting the motion for judgment without allowing the defendant to be heard in his own defense.

Per curiam. The plaintiff's case does not come within the meaning of Act. 52, S. L. 1905, of an action "founded upon an open account" supported by affidavit of the party that the account is correct; that all the goods have been delivered, and that all lawful offsets, payments and credits have been allowed, which under the statute is to be taken as prima facie evidence

Estate of Holmes v. Fujitani, 19 Haw 574.

thereof unless the party resisting the claim file with his answer a counter affidavit stating the items which are incorrect and those which are correct, failing which counter affidavit he is not to be permitted to deny the account or any item therein which he shall not particularize in the counter affidavit. An action upon an account stated or for goods sold and delivered, not accompanied by a bill of particulars or a statement of the account, is not an action upon an open account. "Estate of M. V. Holmes" is not the name of a person nor does it appear from the record to be that of a corporation. The defect should be cured before further proceedings. Judgment vacated, case remanded.

W. W. Thayer for plaintiff.

M. T. Furtado for defendant.

IN RE PETITION OF MARY H. ATCHERLEY FOR A
WRIT OF HABEAS CORPUS ON BEHALF OF
JOHN ATCHERLEY.

ORIGINAL.

SUBMITTED OCTOBER 27, 1909.

DECIDED OCTOBER 27, 1909.

BEFORE HARTWELL, C. J., AT CHAMBERS.

HABEAS CORPUS.

Writ denied in behalf of a person confined at the insane asylum it being discretionary in such case, the illegality of the confinement having already been considered in several aspects (*In re Atcherley*, 19 Haw. 535,) and other grounds of alleged illegality being named in a writ of certiorari now pending; the remaining grounds being reviewable, if at all, on error.

In re Atcherley, 19 Haw. 576.

OPINION.

The petition recites the confinement in the insane asylum considered in the opinion of this court on reserved questions *In re Atcherley*, 19 Haw. 535, and avers it to be illegal upon grounds in substance as follows: (1) denial of jury trial; (2) failure of witnesses to appear at the hearing before the commissioners of insanity; (3) lack of jurisdiction of the commissioners to subpoena witnesses or compel their attendance; (4) denial of "right of arguing on the various testimonies" before the district court; (5) absence of "remedy at law to appeal for any perjuries committed by the various witnesses who testified in behalf of the persecution," as Act 149 S. L. 1909 does not give the commissioners the right to administer oaths; (6) that the proceedings involved second trial "for a former case (the shooting on Dr. Wayson's premises) already tried by a jury; (7) the magistrate or the commissioners had no jurisdiction; (8) the Act 149 is unconstitutional and void in authorizing arrest on a sworn complaint not stating the "facts or proof" of the "extent of the insanity and danger of the insane, that is within the knowledge of the complainant;" in authorizing commitment by a court of inferior jurisdiction created by the legislature without appeal to any court of record. The Organic Act providing that the judicial power of the Territory shall be vested in one supreme court, circuit courts and such inferior courts as the legislature may establish this is not due process of law (9) because after commitment one may be released only upon application by a sheriff, deputy sheriff or relative, being deprived of the right to apply himself or by his attorneys; (10) that during the proceedings and various hearings since the arrest, July 15 last, Dr. Atcherley showed no lack of memory or reasoning faculties but conducted the proceedings as his own attorney, examining and cross-examining witnesses, which "no insane person who had become dangerous through such insanity and loss of mind could

In re Atcherley, 19 Haw. 576.

have done," and (11) that he has applied to the district magistrate, the commissioners, the first circuit judge and the supreme court to be released on bail or placed in such custody as shall be proper, but they have refused to release him either on bail or otherwise.

Of the various grounds on which this writ is asked several were passed upon or considered by this court in the opinion above cited, the court in effect finding that the Act 149 contained enough which was constitutional to justify the confinement in the insane asylum. Other grounds are specified as error in the writ of certiorari now pending and to be heard as soon as the record is presented, the remaining grounds being such as are reviewable, if at all, on error.

The issuing of the writ in this case is discretionary since the detention at the asylum is "in execution of process," and under the circumstances is denied.

Petitioner pro se.

NETTIE L. SCOTT *v.* TERRITORY OF HAWAII.

Extract from minutes of Clerk of Supreme Court, October 20.

Attorney General Hemenway, and Messrs. Cathcart and Milverton, attorneys for plaintiff in the pending action of Scott *v.* Territory, appeared in response to the following letter addressed to them yesterday:

"The supreme court desires to hear you tomorrow morning at ten o'clock upon the question whether a county attorney or deputy county attorney ought to be permitted to conduct the above case against the Territory.

"Yours truly,

"J. A. THOMPSON,

"Clerk Supreme Court."

The chief justice called their attention to the fact that the attorney general would not for a moment allow his appointed

Scott v. Territory, 19 Haw. 578.

deputy to appear in a proceeding against the Territory and that the statute made county attorneys his deputies. Mr. Milverton said that he considered that the duties of the county attorneys, as defined in the County Act, did not preclude their representing cases against the Territory, but that he and Mr. Cathcart wished to withdraw from the case if any of the justices had the slightest doubt as to the propriety of their representing the plaintiff in the case against the Territory. Mr. Cathcart said that when he took the case for the plaintiff, who was an old client of his, it did not occur to him that there could be any objection to that course but that he would withdraw from the case if any of the court thought that he ought to do so. The attorney general said that he considered it a question merely of ethics which each person would decide for himself.

Perry, J. It is my view that neither the city and county attorney nor his deputy may properly appear for the plaintiff in this case, or in any other case, against the Territory.

Wilder, J. Aside from any question as to the legal right of a county attorney to represent a party in an action against the Territory, I am of the opinion that it is improper for him to do so, particularly in view of the impression generally on the community, which would be bad, that of allowing a government officer to prosecute a private claim against the government.

Hartwell, C. J. I think county attorneys ought not to appear in any civil case against the Territory any more than against the county, not only because it looks badly and makes an unfortunate impression on the community, but because I think it is wrong. I cannot disserve the interests of the county from those of the Territory. Moreover, as deputies of the attorney general, made so by statute, it would be the duty of the county attorneys, as I conceive it, although the statute does not require them to do so, to report to the attorney general any material matters which come to their knowledge affecting the

Scott v. Territory, 19 Haw. 578.

interests of the Territory. They could not do this while bringing cases against the Territory. I am very glad that Messrs. Cathcart and Milverton wish to withdraw from the case if any of us think that they ought to do so and I respect them for taking this course rather than the opposite. I think they ought to withdraw from all connection with this case.

Thereupon Mr. Cathcart asked permission for himself and Mr. Milverton to retire from the case.

NETTIE L. SCOTT v. TERRITORY OF HAWAII.

ORIGINAL.

TRIED OCTOBER 25, 26, 1909.

DECIDED OCTOBER 29, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CONTRACT—*teacher's appointment—estoppel.*

An accepted appointment as principal of a school is by rules and regulations of the department of public instruction subject to removal or transfer whenever the efficiency of the department would thereby be promoted. An appointee by bringing action claiming that a removal in contemplation of transfer was wrongful is estopped by the pleading from claiming that the department had not acted by a quorum.

OPINION OF THE COURT BY HARTWELL, C.J.

The material averments in the petition are that in July last the department of public instruction reappointed the plaintiff as principal of the Holualoa school in the district of Kona, county of Hawaii, for one year from September 1 last at a salary of \$1500, and that the petitioner being notified of the appointment by the department of public instruction immediately accepted it; that September 3 last Charles E. King,

Scott v. Territory, 19 Haw. 580.

an agent of the department, gave to the petitioner the oral message that the department had removed her from the principalship; that September 6 last she was informed by A. F. Judd, one of the commissioners of public instruction, purporting to speak for the department, "We adhere to our decision announced to you by Mr. King on last Friday. You are removed as principal of the Holualoa school," and that September 8 W. H. Babbitt, superintendent of public instruction, notified the petitioner that "Arrangements have been made to have the Holualoa School opened Monday, September 13th, by one of the assistant teachers, and Mr. H. M. Wells has been appointed principal of the Holualoa School for the year. He will take charge Wednesday, September 15;" that September 13 the petitioner was at the school prepared to perform the duties required under her appointment but found there another person having written authority from the department to take charge of the school and who did then take charge and prevented the petitioner from doing any acts or performing any duties under her appointment and that ever since then that person and H. M. Wells, who succeeded him, acting under the instructions of the department, have prevented petitioner from performing any duties under her said appointment; that petitioner has done nothing to justify her removal or to justify the department in preventing her from performing the duties devolving upon her under her appointment, and that by reason of the wrongful acts of the superintendent of public instruction and the commissioners and the agents of the department in removing the petitioner from the school and preventing her from doing her part of the contract of employment under her appointment as its principal she has been damaged in the sum of \$1500, which she claims with costs.

We find from the evidence that last July the petitioner was appointed by the department of public instruction principal of the Holualoa school for one year from September 13 last,

Scott v. Territory, 19 Haw. 580.

when the school was to open, and that by not declining the appointment she is regarded as having accepted it; that September 3 the superintendent and the two commissioners of Oahu after conducting an investigation into the affairs of the Holualoa school voted to transfer plaintiff to the principalship of some other school in the Territory; that September 3 she was notified of her removal by an agent of the department; that on September 8 the superintendent wrote to her as follows:

“Mrs. Nettie L. Scott,
Holualoa, Hawaii.

Dear Madame:—“This is to formally notify you that after the hearings regarding Holualoa School, given yourself and Mrs. Maydwell and numerous friends of both, the decision of the Department of Public Instruction was, as you were orally notified on September 7th, 1909, that the best interests of the Department demand that you be transferred from the Holualoa School to some school without the district of Kona. This action was taken under Section 3, page 31 of the Rules and Regulations of the Department under the heading ‘Dismissal and Transfer of Teachers’ as follows:

‘A teacher may be transferred from one school to another when it shall seem that the efficiency of the Department will be promoted thereby.’

“The action taken was not in any sense based on the charge of unusual or excessive punishments which charge was felt not to have been substantiated nor was it the result of any charge presented by Mrs. Maydwell.

“The Department’s action was based upon your own statements concerning the school and your work there as principal. For five years there was in your school an assistant teacher considered by you deficient although capable of better work. For this teacher you had a lack of friendly feeling and as little social intercourse in school matters as possible. In 1907 you considered this teacher to have committed an act of insubordination. This fact you, as principal, failed to call to the attention of the Department and in this did not carry out the responsibilities of the principalship.

“You will please understand that this action was in no sense a dismissal.

Scott v. Territory, 19 Haw. 580.

"Your work as an instructor has been extremely creditable and satisfactory. The Department considers that from this fact and your length of service you merited great consideration and should be placed as principal in some school where you could continue in the public service.

"You were notified on September 7 of the willingness of the Department to give you a principalship elsewhere and you promised to notify the Superintendent on the evening of the 7th or the morning of the 8th whether or not you wished to accept such a position. No notice has been received by the Department in accordance with this promise and you have left the city. The Department has therefore had to proceed on the assumption that you do not desire another principalship. Arrangements have been made to have the Hualaloa School opened Monday, September 13th by one of the assistant teachers and Mr. H. M. Wells has been appointed principal of the Hualaloa School for the year. He will take charge Wednesday, September 15th.

"Very respectfully yours,

"W. H. BABBITT,

"Superintendent of Public Instruction;"

that the department, receiving no answer from the letter of September 8, appointed another principal to the school who thereupon took charge of it and prevented the petitioner from taking charge.

Instead of complying with the request of the superintendent and notifying him whether she would accept some other school, none having then been designated, the petitioner elected to regard her removal from the Hualaloa school as a breach of her contract of employment and on September 28 brought this action for damages. If she had not taken this course she might have been regarded as continuing in the employment of the department and entitled to her salary until another school should be offered to her. It was unnecessary that the contemplated transfer be made immediately. The bringing of the action, however, absolved the department from any obligation to obtain for her another school she having treated her relation

Scott v. Territory, 19 Haw. 580.

to the department as closed, thereby in effect refusing to consider any proposal, if made, for another school.

July 14 the board of commissioners passed a resolution leaving to the superintendent and the two commissioners of Oahu the reassignment of teachers and no action in the matter has been taken by "the superintendent and three commissioners or, in the absence of the superintendent, four commissioners," who, under Sec. 188 R. L., as amended by Act 42 S. L. 1909, "constitute a quorum for the transaction of business." The petitioner in argument claimed that her removal was not the act of the department, which could not delegate its power of removal or transfer to any committee consisting of any less number than would form a quorum. It may be true that the petitioner could have treated the removal and attempted transfer as not the act of the department until its ratification of the action taken by the committee. But she has brought this action based upon the claim that the department wrongfully removed her from the school and therefore is estopped from claiming that it had not removed her. If instead of bringing the action the petitioner had insisted that the department had taken no action authorized by the statute, and this were held to be the case, she might have been entitled to her salary until the department had acted by a quorum.

Under the rules and regulations of the department "a teacher may be transferred from one school to another when it shall seem that the efficiency of the department will be promoted thereby." The court has no power to review the action of the department in transferring teachers unless perhaps to inquire whether the action was taken arbitrarily, or, as appears from the evidence to be the case, in good faith.

Judgment for defendant.

M. F. Scott, by leave of court, for plaintiff.

Lorrin Andrews, Deputy Attorney General, for defendant.

Kona Development Co. v. Scott, 19 Haw. 585.

KONA DEVELOPMENT CO., LIMITED, JAMES B. CASTLE, F. B. McSTOCKER, WEST HAWAII RAILROAD COMPANY AND HAWAIIAN DEVELOPMENT COMPANY, LIMITED, v. M. F. SCOTT, NETTIE L. SCOTT; WILLIAM R. CASTLE, TRUSTEE, AND B. F. DILLINGHAM.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 18, 1909.

DECIDED NOVEMBER 1, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

EQUITY—*injunction to restrain action at law.*

A bill for an injunction to restrain an action at law, there being no equitable features in the case, does not justify an injunction on the ground that an account is to be taken of such a nature that it "cannot be conveniently and properly justified and settled in an action at law," the bill containing insufficient allegations to sustain a bill for accounting and no prayer for it.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal by plaintiffs from a decree dissolving an injunction issued upon the filing of their bill praying for an injunction to restrain the defendants Scott and wife from proceeding in an action of assumpsit against the Kona Development Co. to recover the sum of \$74,194.97, with interest, for breach of a contract between Scott and defendant McStocker for furnishing money to Scott to pay rents and plant 200 acres of land with cane and cultivate the same together with cane he had planted on 300 acres, McStocker to form a corporation "which shall furnish adequate capital, sugar mill and facilities for transporting the said sugar cane, when harvested, and manufacturing the same into sugar," Scott to have all over and above \$40,000 of the net proceeds coming from the sugar. The declaration in the action sets out the contract and avers that McStocker, after having furnished Scott with \$19,000

Kona Development Co. v. Scott, 19 Haw. 585.

used for cultivating the cane, formed the Kona Development Co., to which he sold his interests under the contract, the company assuming his obligations; that advances of money were afterwards made to Scott by the company and also by McStocker, and that by April 30, 1908, Scott had delivered to the company 9774 tons of cane containing 1356.058 tons of sugar, out of which at least 1193.3317 tons of sugar would have been made with an adequate mill although 271.2117 tons less were accounted for, which would have netted \$14,972.36; that Scott and his wife expended large sums of money in carrying out the contract; that in April 1908 the plaintiffs sold the standing cane to the company for \$64,565.28 in addition to what there was owing for cane already furnished, and that after adding what was due therefrom \$74,194.97 is due to the plaintiffs.

From this pleading, which is not in common law form, but in the prolix narrative form peculiar to the code system, it appears the damages laid are for the failure of the defendant to take off the cane at the place agreed upon or to furnish a mill adequate to extract the full amount of sugar available from the cane and for its nonpayment of the agreed price for purchase of standing cane.

The bill, after reciting the contract which is dated July 5, 1905, alleges that McStocker's advances to Scott of \$20,000 were made with the assistance of James B. Castle, one of the plaintiffs; that in carrying out the contract McStocker, Castle and their associates formed the plaintiff corporations West Hawaii Railroad Company, Hawaiian Development Company and Kona Development Company to erect and maintain a sugar mill, construct and maintain a railroad to transport cane from the fields to the mill and to act as sugar factors marketing the product of the Kona Development Co. "and to raise and furnish means for carrying on said enterprise in Kona;" that Scott not being able to carry it out his agents, McStocker and

Kona Development Co. v. Scott. 19 Haw. 585.

James B. Castle, advanced further sums of money, some of which was expended in accordance with the agreement in cultivating cane and some was diverted to other purposes not contemplated in making the advances, including items for taxes, cash paid to Mrs. Scott, to Cathcart on the order of Scott, interest on the cost of the West Hawaii Railroad extension, land rents, all of which Scott had agreed to pay, he claiming certain charges and credits for wood and seed cane sold, interest, rents, notes of one Hutchins, indorsed by McStocker, amounting to \$11,796.44, which Mrs. Scott claimed to be her property although her husband had assigned them to McStocker and James B. Castle as security for advances; that the Kona Development Co. took over McStocker's contract about January 1, 1907, and thereafter the accounts were kept on the books of the company showing advances and charges by the company and its receipts, but the company made no agreement to assume the obligations of the contract other than implied from taking it over; that under the contract Scott delivered cane to the cars of the railroad company which was ground by the Kona Development Co. and marketed by the Hawaiian Development Co., the gross proceeds being credited to Scott and cost of transporting and manufacturing into sugar, bagging, marketing, agents' commission, a net profit of \$6 a ton, a pro rata amount of cost of managing the corporations, together with the sum of \$20,000 advanced and \$20,000 to be paid out of the crop being credited to McStocker and charged to Scott; that the plaintiffs and Scott having got into a dispute in regard to his compliance with the contract for delivery of the cane the Kona Development Co. took possession of and harvested the cane on fields known as Whitmarsh fields and afterwards agreed upon arbitration and award to settle their differences, the agreement being acknowledged before a judge of the circuit court and entered as a rule of court, the agreement enumerating eleven several claims made by the parties;

Kona Development Co. v. Scott. 19 Haw. 585.

that the parties had a hearing before Judge Matthewman, A. W. Carter and George Clark who made an award October 7, 1907, which was filed in the circuit court of the first circuit, but that Scott moved to set aside the submission on the ground that it was void in providing for an appeal on points of law only or bill of exceptions and because the award was not made in writing and delivered to the parties before August 31, 1907, as provided in the submission, and while the appeal of the Kona Development Co. upon the granting of the motion was pending the plaintiffs entered into negotiations with Scott for settling matters in dispute resulting in an agreement June 6, 1908, between Mr. and Mrs. Scott of the first part, the Kona Development Co., James B. Castle and McStocker of the second part, the railroad company and Hawaiian Development Co. of the third part, and the defendant William R. Castle, trustee, of the fourth part, whereby Scott sold to the Kona Development Co. his interest in the cane and certain leaseholds for \$78,000, the sum to be reduced according as the area of cane should be found to be less than 500 acres and to be increased by \$15,000 to cover the Hutchins' notes, Mrs. Scott to release her interest in them and convey the Norton land for \$50 an acre to James B. Castle, the Kona Development Co. to release to Scott and his wife a certain mortgage, the plaintiffs to execute notes for \$93,000, payable, as therein provided, in part to Scott and in part to his wife in one, two and three years from date, the notes to be deposited with W. R. Castle, trustee, in satisfaction of any claim which might be found due from any of the plaintiffs to the Scotts and to be held and disposed of by the trustee in accordance with the agreement; that if full settlement between the Kona Development Co., James B. Castle, McStocker and the Scotts should not be agreed upon in three months then arbitration might be agreed upon, or upon failure to agree upon it Scott "could bring such suit or suits, action or actions as he deemed advisable to settle and

Kona Development Co. v. Scott, 19 Haw. 585.

determine the amounts so in dispute, and upon a final adjustment by the arbitrators and court in any such suit, submission or action the trustee to dispose of the notes remaining in his hands as before provided and thereby terminate the trust;" that the notes were executed, indorsed and deposited with W. R. Castle, 'trustee, the parties agreeing that the accounts be made to April 30, 1908; that upon a survey of the cane fields the acreage was found to be 413.88 acres instead of 500 acres, reducing the purchase price to \$64,564.25, whereupon the plaintiffs and Scott wrote to W. R. Castle, trustee, claiming the pro rata deficiency and requesting him to cancel and return notes to that amount or credit any difference between notes returned and that amount upon remaining notes, also notifying him that a statement of the amount claimed to be due, \$76,361.72, from Scott to the plaintiffs, had been delivered to Scott leaving a credit for notes amounting to \$3203.56, which request the trustee complied with; that the plaintiffs had done all things required in their agreement, dismissed their appeal from the order setting aside the submission and award, and have made numerous attempts to have the accounts agreed upon, offering to arbitrate them, but that in violation of the agreement the action at law above mentioned has been brought; that the account due to the Kona Development Co., McStocker and James B. Castle, instead of being \$76,361.82, according to the account rendered, is \$77,139.99, because of the omission of certain items overlooked at the time of the rendition of the account; that May 12, 1908, the defendant Dillingham brought an action against Scott, summoning the Kona Development Co. as garnishee, in which action judgment was rendered October 28, 1908, for Dillingham for the sum of \$1620.72 and costs; that Scott has brought a writ of error upon the judgment "which has been sustained by the supreme court;" that the plaintiffs are entitled to have the account settled, their account of \$77,139.99 allowed and the notes given to the trustee re-

Kona Development Co. v. Scott. 19 Haw. 585.

leased, or if the account is not allowed or the parties are unable to agree upon it or have it referred to arbitrators, that in equity and justice Scott should be "enjoined and directed to forthwith bring his bill of complaint by cross-bill in this action, making all parties hereto parties to said cross-bill to settle the said accounts in order that the same may be determined and that the said trust may be terminated and the said defendant, William R. Castle, trustee, discharged as such trustee," and that Scott and his wife should be perpetually enjoined from maintaining the action concerning the matters and things settled and adjusted by the agreement of June 8, 1908, on the ground that it is oppressive and vexatious, they having adjusted and settled their accounts with the plaintiffs by the notes delivered to Castle, trustee, and having in said agreement provided for an action in equity and settled the amount due if not fixed by agreement or arbitration, and because the Kona Development Co. will be put to great expense and annoyance in defending the action, which defense would be unnecessary and useless since equity must be resorted to to enjoin the enforcement of any judgment against it; that it is advised that it cannot safely rely on setting up as a defense in the action the "matters and things herein set forth, which are a full and complete equitable defense," and further that the other plaintiffs are entitled to be heard in settling the account but are not parties and can make no defense in the action, and on the further ground that the accounts are of a complicated nature involving numerous items. The foregoing statement does not include allegations as to Scott's undertaking to revoke an irrevocable power of attorney to Conant and the subsequent acts of the attorney.

Mr. and Mrs. Scott demurred to the bill for want of equity or showing to warrant equity in interfering with the execution of the trust, because plaintiffs have not done equity in taking the Whitmarsh fields and harvesting the crop thereon, that

Kona Development Co. v. Scott. 19 Haw. 585.

Scott is entitled under the agreement to bring the action, that matters of equitable defenses in the action had been settled by agreement; misjoinder of plaintiffs as James B. Castle, McStocker, the railroad company and Kona Development Co. have no claim for relief against Scott or his wife or to any equitable defense to the action; misjoinder of defendants W. R. Castle and Dillingham as they are doing or threatening to do nothing adverse to any of the plaintiffs and have no claim against any of them. Before hearing on their demurrers the demurrants moved that the injunction be dissolved for want of equity, which motion was granted.

Neither the declaration in the action nor the bill in equity presents any question which requires to be passed upon by a court of equity or which is not cognizable in a court of law. The plaintiffs' claim to be entitled to an injunction on the ground that the action is in violation of the agreement to arbitrate of June 6, 1908, requires that the right reserved to bring an action in three months, if no settlement were reached by arbitration or otherwise, be restricted to a suit in equity. But the agreement reserves the right to bring any action or actions, suit or suits and leaves Scott at liberty to select whatever remedy is appropriate whether in law or equity.

We see no inadequacy of the legal remedy in consequence of its requiring a money judgment while notes are deposited with a trustee to satisfy such judgment if any is made, for it is to be presumed that they would be applied in payment of the judgment precluding an issue of execution. There is no trust which is shown to require regulation or enforcement or the violation of which is apprehended. A case is not shown "in which there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law" (Sec. 1834 R. L.), since in order to ascertain whether the Kona Development Co., the defendant in the action, is indebted as

Kona Development Co. v. Scott, 19 Haw. 585.

claimed therein no distinct rights or interests are involved other than those of the parties to the action, and there are none which cannot be justly decided and adjusted in the action. Dillingham's claim on his judgment does not require him to be a party defendant.

The only reason why equity would be preferable is that the account may be of such nature "that it cannot be conveniently and properly adjusted and settled in an action at law." Sec. 1834 R. L. As jurisdiction at law in matters of accounts is concurrent, however, with that of equity when there is no equitable feature or equitable relief required, the authority to enjoin the action rests upon the question whether it appears that the accounts cannot be conveniently and properly passed upon in the action.

In *Kawananakoa v. Puahi*, 14 Haw. 72, an action by an agent against its principal to recover agent's commissions was enjoined, but the bill showed fiduciary relations between defendant and plaintiff upon which ground the court held "the jurisdiction can clearly be supported," there appearing to have been no discussion of the question of enjoining the action and the attention of the court being directed mainly to whether equity had jurisdiction of a suit for accounting.

The question whether the accounts in this case are too complicated for a jury trial does not appear to be controlled by any former decision and can hardly be dealt with by any general rule to be applied under all circumstances.

"It is not every count which will entitle a Court of equity to interfere: it must be such an account as cannot possibly be taken justly and fairly in a Court of law." *Freitas v. Dos Santos*, 1 Y. & J., Ex. 576.

In *King v. Rossett*, 2 Y & J. Ex. 32, an injunction was sought against an action on accounts, but the court said that equity will not interfere unless "by showing an account which cannot fairly be investigated by a Court of Law. Unless Courts of Equity were to put that limit to their interference, no case

Kona Development Co. v. Scott. 19 Haw. 585.

of this description would ever be tried in a Court of Law, and wherever a person was entitled to a set-off, a bill might be sustained." In *North-Eastern Ry. Co. v. Martin*, 2 Ph. 757, an injunction to restrain an action for the balance of an account on the ground that it was "too complicated to be examined with necessary accuracy in a court of law," was denied, the court saying:

"The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties. It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise this jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is therefore, necessary for this court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties."

On the other hand, in *Fenno v. Primrose*, 116 Fed. 49, it was held that equity should enjoin if the account is such that "the most that a jury could award would be a lump sum, derived from general impressions remaining as the consequence of a trial covering" a long period of time "and involving a great multitude of items of all kinds."

In this case it is to be observed that it is not only accounts which are to be settled, but the adequacy of the mill for taking off the crop involves ascertainment by evidence of facts peculiarly appropriate for a jury to find, upon which facts important legal rights of the parties depend. Moreover, "Actions for accounting are within the concurrent jurisdiction of law and equity and the one first taking actual cognizance of any particular controversy ordinarily retains exclusive jurisdiction." *Kaleikini v. Waterhouse*, 19 Haw. 359, 361.

Kona Development Co. v. Scott. 19 Haw. 585.

But in view of the difficulty of saying whether the action involves the taking of accounts too intricate for a jury to pass upon we prefer to regard the injunction as properly dissolved on the ground that the bill does not contain averments requisite to sustain a bill for an accounting. It does not even pray for an accounting, nor does it allege that on a taking of an account it would appear that a balance would be found to be owing by the defendants to the plaintiffs and that the plaintiffs are ready and willing to pay whatever balance, if any, should be found upon the accounting to be owing by them to defendants.

Decree affirmed.

A. L. Castle (*Castle & Withington* and *Kinney, Ballou, Prosser & Anderson* on the brief) for plaintiffs.

F. W. Milverton (*J. W. Cathcart* with him on the brief) for Mr. and Mrs. Scott.

WILLIAM W. BIERCE, LIMITED, v. WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 30, 1909.

DECIDED NOVEMBER 6, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

APPEAL AND ERROR—*dismissal of writ.*

On exceptions by defendants, judgment for defendants non obstante veredicto was ordered. After entry in the lower court of the judgment non obstante plaintiff obtained a writ of error to review it. Held, that under these circumstances the writ should not be dismissed.

Bierce v. Waterhouse, 19 Haw. 594.

Id.—*questions previously decided on exceptions.*

A change in the personnel of the court does not of itself justify re-examination of a subsequent writ of error of questions already decided on exceptions in the same case,—assuming that the court has the power to do so.

OPINION OF THE COURT BY PERRY, J.

This case was before us in April, 1909, on a bill of exceptions brought by the defendants. 19 Haw. 398. A full statement of the case will be found in our former opinion. The conclusion of that opinion and the order there contained was, “the exception to the overruling of defendants’ motion for judgment non obstante verdicto in so far as it is based upon their discharge from liability by the plaintiff’s amendments of value is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon.” A petition for re-hearing was filed and denied. Pursuing the ordinary practice, a communication was thereupon sent by the clerk to the court appealed from, notifying that tribunal of the conclusion thus reached by this court but containing no express order as to future proceedings. Subsequently the circuit court entered judgment for the defendants non obstante veredicto and for \$1097.22 statutory attorneys’ fees and costs. Plaintiff thereupon took out a writ of error from this court assigning as error the entry of the judgment non obstante. Defendants move to dismiss this writ on the grounds (a) that the record upon the writ does not present the record upon which the former decision of this court was based but only parts of the same, and (b) that the writ brings up no proceedings subsequent to the former decision of this court other than those had in exact accordance with such decision.

After the filing of the motion to dismiss plaintiff moved for a writ of certiorari commanding the lower court to certify to this court as a part of the record upon the writ of error the

Bierce v. Waterhouse, 19 Haw. 594.

former bill of exceptions and certain other documents the omission of which is referred to as one of the grounds of the motion to dismiss. Some of these documents had been returned to the circuit court from this court after the former decision and others are still in this court. The statute, R. L. Sec. 1873, itself makes the bill of exceptions and the other documents a part of the record on this writ of error and it is in the interest of a correct determination of the cause in the supreme court of the United States, even if not necessary on this writ in this court, that the record should be complete. It was therefore ordered upon the presentation of the motion for the writ of certiorari that all documents in the case still in this court be transferred to and made a part of the record upon this writ and that the circuit court be directed to certify the remaining documents.

As to the motion to dismiss. The judgment non obstante was not specifically ordered by this court although it was a necessary result of our former opinion. It was the judgment of the circuit court in form and in fact although it was in precise accordance with our views and conclusion, but whether it was entered in accordance with our former opinion is something which cannot be determined without entertaining the present writ and thereunder examining the record brought up by it of the proceedings had in the lower court. It is a contradiction in terms to say that we find that the proceedings had were in compliance with our former conclusion and at the same time to say that the party is not entitled to the writ and that the latter must be dismissed. A dismissal is something which happens in limine and without a consideration of the merits. Even those courts which hold that a dismissal is the proper course rather than an affirmance of the judgment below entertain jurisdiction under the writ and reverse the action taken below if they find that it was not in accordance with the

Bierce v. Waterhouse, 19 Haw. 594.

former mandate. See, for example, *Stewart v. Salamon*, 97 U. S. 361, 362; *Railroad v. Anderson*, 149 U. S. 237, 242; *Cook v. Burnley*, 11 Wall. 672, 674; *Browder v. M'Arthur*, 7 Wheat. 58; *Roberts v. Cooper*, 20 Haw. 467, 481; *Supervisors v. Kennicott*, 94 U. S. 498; 499; *The "Lady Pike,"* 96 U. S. 461, 462. The correct procedure, on reason, would seem to be to entertain jurisdiction and either affirm or reverse the judgment appealed from. What questions are open to re-examination on such a writ is another matter. The mere fact, if such be the course adopted, that upon such a writ no re-examination is had upon issues arising prior to the entry of judgment and disposed of on a first appeal will effectively discourage an abuse of process in the taking of second or third appeals.

That this is the better rule appears even more clearly when we consider the class of cases where the circumstances are as they are in the case at bar. By the act of March 3, 1905 (33 Stat. at Large, p. 1035), it was enacted that "writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the supreme court of the United States *in all cases* where the amount involved, exclusive of costs, exceeds the sum or value of \$5000." Congress clearly contemplated that appeals should lie *in all cases*, within the prescribed monetary limit, in which by a decision final in Hawaii the supreme court of Hawaii should determine the law, or in which, being within its jurisdiction, it should be asked to so determine the law. A decision by this court, such as was rendered in the case at bar, upon questions arising under a bill of exceptions is not final and appealable within the meaning of the act of 1905. This has been definitely determined by the supreme court of the United States. *Cotton v. Hawaii*, 211 U. S. 162, 170, 174, 175; *Hutchins v. Bierce*, 211 U. S. 429; *Spreckels v. Brown*, 212 U. S. 208. It cannot be said in this case that the plaintiff has waived its right to place itself in a

Bierce v. Waterhouse, 19 Haw. 594.

position to enable it to appeal to the supreme court of the United States, for the former bill of exceptions was not brought by it but by its opponent. The plaintiff at that time was not aggrieved. The judgment of the lower court stood in its favor. It was aggrieved by our decision on the exceptions but had no right of appeal therefrom. Now for the first time the judgment of the circuit court stands against it. To hold that a writ of error lies to review the judgment non obstante, however narrow the reviewable issues may be in *this* court, is to further the intent of congress as expressed in the act of 1905, while to hold the opposite is to nullify the provisions of that act and to deprive parties of the right to a review in the supreme court of the United States in a large class of cases, without any waiver and purely in consequence of the act of an opponent in choosing his method of review in the supreme court of Hawaii. At best it is a choice in a matter of mere procedure. That method is to be preferred which carries into effect the act of congress. While it is true that this court should neither accelerate nor retard appeals from its decisions, it should nevertheless so act as not to deprive parties by its own act or permit them to be deprived by the act of an opponent of a right of appeal secured to them by congressional legislation.

It is true that in a number of cases the supreme court of the United States has adopted the procedure of dismissing second appeals and writs when they are simply taken from judgments and decrees entered in conformity with an earlier mandate of the appellate court, and other courts likewise have so held. In none of those cases, however, was the first adjudication by a court of intermediate appeal and non-appealable to a court of last resort and therein lies an important distinction and one which requires the adoption of a rule contrary to that followed by the supreme court of the United States. But even in the latter tribunal instances are not wanting where the

Bierce v. Waterhouse, 19 Haw. 594.

judgment appealed from has been affirmed and the appeal or writ not dismissed. See, for example, *Supervisors v. Kennicott*, supra; *The "Lady Pike,"* supra; *Washington v. Stewart*, 3 How. 413, 425, 426. See also *Lathrop v. Knapp*, 37 Wis. 307; *Fire Department v. Tuttle*, 50 Wis. 552.

Again, our statute on writs of error, R. L. Sec. 1869, contemplates that writs shall be allowed to any and all judgments of the circuit court, and while in this instance that court may have felt under compulsion to enter a judgment non obstante the latter was, nevertheless, its judgment. The plaintiff is entitled, as of right, to the issuance of the writ.

In *Kealoha v. Castle*, 17 Haw. 415, on a writ of error raising no questions other than those already decided upon reserved questions this court affirmed the decree appealed from, and the supreme court of the United States, affirming on the merits our decree, said nothing by way of disapproval of the practice. In *Notley v. Brown*, 17 Haw. 455, relied upon by the defendants, the case first came to this court on a bill of exceptions. The exceptions were overruled. Subsequently the same appellant brought a writ of error, in the same case, assigning as error the same matters decided on the exceptions and also certain proceedings had in the trial court after the remanding order and in conformity with it. The writ was dismissed. The majority is of the opinion that that case is distinguishable from this in that there the same party attempted to review the same questions a second time in the same case, in substantial conflict with the rule of election laid down in *Ferreira v. Rapid Transit Co.*, 16 Haw. 406, while here plaintiff for the first time is attempting to have reviewed a certain question which the statute gives him a right to do and which cannot be denied by this court.

As to how far, if at all, an appellate court is at liberty on a second appeal from a judgment entered in pursuance of its

Bierce v. Waterhouse, 19 Haw. 594.

mandate on a first appeal to re-examine on the merits the questions already considered and decided courts are divided. The great majority, including the supreme court of the United States, take the view that a second appeal or writ brings up for review only the proceedings had in the lower court subsequent to the earlier mandate of the appellate court, and that on such appeal no re-examination may be had of matters occurring prior to the entry of such decree. The law as declared upon the first appeal is said to be "the law of the case" binding upon the appellate court which declared it as well as upon the inferior court. This view is based, sometimes upon the consideration *ut sit finis litium*, the argument being that if parties are to be permitted to take out appeals to secure a review of law once decided there never can be a certain end to the litigation, and sometimes on the theory that it is not within the power of the appellate tribunal to review its own decisions even though it be within its power to review the decisions of lower tribunals,—that the law creating the appellate court gives it the power last mentioned but not the first. Sometimes, again, it is based on the doctrine of *res judicata*. These reasons appear to other courts not to be entirely satisfactory. It is well, indeed, say the latter, that there should be an end to litigation, but far better that occasionally that end be somewhat delayed than that a manifest error should be perpetuated. Concerning the alleged lack of power, it is similarly said that the real question which arises on the second writ is, "Is the judgment appealed from correct in law?" and the correct view that, if it is not, the appellate court, still considering the same case, still having before it the same parties and no final adjudication or execution having yet been rendered or issued, has the power to correct its error. Continuing, the weakness of the attempt to regard the former ruling as *res judicata* is said to lie in the fact that it is not a final judgment and that it is elementary that that doc-

Bierce v. Waterhouse, 19 Haw. 594.

trine is always predicated upon final judgments between the parties. On the other hand it can be said, in favor of the majority rule, that nothing substantial can be gained in the securing of right and justice by permitting a second or a third reopening of an argument instead of regarding the matter as closed after the first opinion with the usual right to a rehearing under the rules of court,—that it is as human to err on a second appeal as it is to err on a first appeal.

A minority of the state courts take the view that, while ordinarily an opinion once declared concerning the law should be thereafter adhered to by the appellate as well as other tribunals, still the rule is not an inflexible one and may be departed from where the prior opinion is manifestly erroneous. *Hastings v. Foxworthy*, 34 L. R. A. 321 (Neb.) contains the best considered opinion to this effect. The other states adopting this view are Missouri, Utah and Texas and, in some of their decisions, Connecticut, New York and Ohio. Which is the better doctrine need not, in the opinion of the majority, be determined in this case, the minority being of the opinion that the power of re-examination exists and that the point is necessarily involved. If the question decided on the bill of exceptions is not now open for re-examination, the judgment below must be affirmed. If, on the other hand, it is within our power to re-examine, the same result is reached. The matter was on the first appeal very carefully considered, after able and exhaustive presentation by counsel. No new argument on the merits is now advanced. It is not contended that any controlling decisions or principles were overlooked. The court is simply asked to study the issue anew, on practically the same briefs (no oral argument is presented) and to endeavor to come to the opposite conclusion. The only substantial hope of a reversal lies in the fact that since the former opinion was rendered, the personnel of the court has changed. This of itself is not sufficient to

Bierce v. Waterhouse, 19 Haw. 594.

justify a re-examination. That degree of certainty which is desirable in the law forbids that a matter once adjudicated be re-opened for such a reason as this.

The motion to dismiss the writ is denied and the judgment non obstante is affirmed.

- C. H. Olson (*Holmes, Stanley & Olson* on the brief) for plaintiff.

A. Lewis Jr. (*Smith & Lewis, J. W. Cathcart and Castle & Withington* on the brief) for defendants.

KAANAPU SYLVA AND HANNAH JACKSON v. WAILUKU SUGAR CO.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED OCTOBER 7, 1909.

DECIDED NOVEMBER 6, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

TRIAL—*motion to direct verdict.*

Where the evidence is conflicting a motion to direct a verdict should be denied.

TRIAL—*instructions.*

In an action of trespass to land various instructions, referred to in the opinion, examined and, although found erroneous in part, held, for the reasons stated, not to require a new trial.

OPINION OF THE COURT BY WILDER, J.

(Perry, J., dissenting.)

This is an action of trespass upon a piece of land at Waikapu, Maui, being substantially one-half of apana 1 of R. P. 2353 L. C. A. 492 to Kepaa. The original awardee died tes-

Sylva v. Walluku Sugar Co., 19 Haw. 602.

tate in 1870 leaving to his wife Kaaua one-half of this land, "the same being the one-half where the wooden house stands." The evidence shows that the wooden house then stood in that part of the apana where the alleged trespass took place. The remaining one-half of Loaloa, the name of the land, was devised to Kaauwai and Kaukoula. Thomas Martin heir of Kaaua, the widow, conveyed to E. P. Adams on July 6, 1872, who on December 14, 1874, deeded to Henry Cornwell by metes and bounds a portion of Loaloa which the evidence shows included that part of the kuleana on which the alleged trespass took place. On June 14, 1875, Kaauwai in consideration of "a piece of land given me this day by Henry Cornwell" deeded to him a little more than one-half of the kuleana which appears from the evidence to have been the lots marked on the map as "Y" and "W," to which part plaintiffs make no claim. On the same day Cornwell "in consideration of the two pieces of land which Kaauwai has given to me" conveyed to Kaauwai that part of the land which is in dispute in this action. Cornwell recorded his deed and Kaauwai failed to record his. Some where near the date of these two deeds Cornwell built a fence across the land substantially dividing it in half. That part of the land which had been deeded to Cornwell by Adams, which included the part that Cornwell conveyed to Kaauwai by the unrecorded deed, was in 1877 and 1879 conveyed by Cornwell to others, the defendant finally getting a deed of it in 1894. After Cornwell built the fence referred to neither he nor any of the subsequent grantees under his deeds of 1877 and 1879 ever had any actual possession of that part of the land in dispute until the defendant in 1908 went on it and plowed it and planted it in cane. The evidence does not show that any grantee subsequent to Cornwell under his deeds of 1877 and 1879 had any actual notice of the unrecorded deed referred to. Plaintiffs claim through Kaauwai and the defendant through Cornwell.

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

The jury returned a verdict for plaintiffs for \$750, which amount was reduced by the court on defendant's motion for a new trial to \$500 as an alternative to granting the motion. Both parties claim paper title to the land and the plaintiffs also claim by prescription. During the trial plaintiffs admitted that they had no title or claim to that part of the apana lying below or makai of the Cornwell fence, already referred to, leaving in dispute the part above or mauka of the fence. Defendant disclaimed any title or right of possession to substantially one-half of the mauka or upper part of the land, being that part which adjoins the road. Defendant brings error.

The first assignment of error we will consider will be the denial at the close of the case of defendant's motion for a directed verdict, in discussing which we will assume that defendant proved it had a paper title to the land in dispute. The motion was based upon the following grounds:

"1st: That it does not appear that plaintiffs are the owners of the property described in the complaint or any part thereof.

"2nd: That it has not been shown that Kaauwai through whom the plaintiffs claim ownership as set forth in the complaint died seized (seized) of any part or portion of the premises set forth and described in the complaint.

"3rd: It has not been shown by any evidence that Ulunui the widow of Kaauwai inherited or obtained in any other way title to any part or portion of the land described in the plaintiffs' complaint.

"4th: It does not appear that plaintiffs were at the time of the alleged trespass in possession of the premises upon which it is alleged that trespass was committed.

"5th: It does not appear that plaintiffs were the owners of any part or portion of the property alleged to have been damaged or trespassed upon."

If there was evidence tending to show that plaintiffs had acquired title to this land by prescription then the motion was properly denied irrespective of its other grounds. After an

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

examination of all of the testimony we have no hesitation in declaring that there was ample evidence from which the jury could find that the plaintiffs had acquired by adverse possession that part of the land upon which the alleged trespass took place. Without setting it out in detail it was to the effect that all of the land mauka of the Cornwell fence and including the part upon which the alleged trespass took place had been in the actual possession of plaintiffs and others under whom they claimed for much longer than the statutory period, that all of it was fenced in as one lot, having the "Cornwell fence" on the makai side, a stone wall along the road, a fence along the Kaina land and a fence and wall along the mauka boundary, that parts of it had been actually cultivated by them, parts of it used for pasturage and parts for the interment of their relatives, that they had paid taxes upon the whole of it, and that all this was done under a claim of right. It further appeared that defendant took a ten-year lease in 1898 from one of the plaintiffs of his undivided interest in the land and that it caused to be paid its lessor's taxes thereon. As the defendant introduced evidence conflicting with that put on by the plaintiffs the matter was properly left to the jury.

The next assignments of error relate to the instructions given, refused and modified. Defendant contends that the trial court erred in giving plaintiffs' requested instructions 13, 14 and 15 which are as follows:

No. 13. "Section 1988 of the Revised Laws of Hawaii is as follows: 'No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action, first accrued.'

"Section 1989 of the Revised Laws of Hawaii is as follows: 'If such right first accrued to any ancestor or predecessor of the person bringing such action, or making such entry, or to any person from, by or under whom he claims, the said ten years shall be computed from the time when the right first accrued to such ancestor, predecessor or other person.'

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

"I charge you under these statutes as matter of law, that if you find from the evidence in this case that the plaintiffs in this action were in the possession of the lands mentioned in the complaint in this action, or any of said lands, for a period of ten years or more, having said land so possessed by them under fence, living upon same, and cultivating the same, that in law the plaintiffs are the owners of said land, and any entry upon such lands so possessed by the plaintiffs for ten years or more next preceding such entry, if such entry was made, by the defendant, was wrongful and unlawful, although made under a claim of title."

No. 14. "If you find from the evidence in this case that the plaintiffs were in the adverse possession of the lands described in the complaint, or any part of said lands, and had been in such possession for ten years continuously and uninterruptedly next preceding the entry of the defendant upon such land so possessed by the plaintiffs, if the defendant entered thereon, then as matter of law the Court instructs you that such entry was unlawful and you must find for the plaintiffs."

No. 15. "The Court instructs you that living upon land under claim of title, cultivating same or parts thereof constitute adverse possession as against another claimant knowing or having reasonable means of knowing of such acts, and when continued for a period of ten years or more constitute title by prescription in the party so occupying such premises as against the world. Payment of taxes coupled with actual possession such as is above stated is notice of claim of title and if continued for ten years gives title by prescription in the party having such possession and paying such taxes."

The error claimed is that by referring in each instruction to the possession of the lands mentioned in the complaint or any of said lands the jury was at liberty to find for the plaintiffs from evidence of actual possession only of the part as to which defendant disclaimed title although mentioned in the complaint. It seemed to be clearly understood during the trial, however, just how much of the land was in dispute and as to what part the evidence of adverse possession related. Consequently we fail to see how defendant was prejudiced by these

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

instructions in that regard, although to be sure they might have been more appropriately worded. But in this connection defendant requested an instruction (No. 2) which was given and in which we find the following language: "The Court further instructs you that you must be convinced to your satisfaction by a preponderance of the evidence that the plaintiffs in this cause were in the actual peaceable possession of the premises set forth and described in their complaint," etc. At the request of defendant the jury was also instructed as follows:

"In order that plaintiffs may be considered to have been in possession of the property deeded by Cornwell to Kaauwai under color of title, it is necessary that it should be shown by a preponderance of the evidence that plaintiffs were actually in possession of some part or portion of the premises set forth and described in said deed at the time the alleged trespass took place."

It is further contended that plaintiffs' instruction No. 15 was erroneous in its reference to the payment of the taxes. While the payment of taxes in some cases may be of slight significance, still no harm was done defendant in this instance when the jury was instructed that the payment of taxes had to be "coupled with actual possession such as is above stated."

It is earnestly contended that the giving of plaintiffs' requested instruction 18 was erroneous. That instruction reads as follows:

"If you find from the evidence in this case that the defendant entered upon the lands in dispute as shown by the evidence or any portion of them under a claim of title, or deed, that such entry was, in law, wrongful unless such entry was made within the period of ten years from the date the title or right to such land was first vested in the party making such entry, the defendant, and within ten years from the time the right to such land accrued to the predecessor or predecessors, if any, under whom such right is claimed by the defendant."

The argument is that under the most favorable view the jury might have taken of the evidence, the plaintiffs would only be

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

tenants in common with defendant, and that as no ouster of defendant was shown this instruction was a most serious error. If, however, as already pointed out, the jury found from the evidence, as they could, that plaintiffs had title to and right of possession of the land upon which the alleged trespass took place by prescription, which did not rest on their claim under the unrecorded deed, that eliminated any possibility of defendant being a tenant in common. Conceding, however, that the instruction was erroneous in not clearly stating that the statutory period begins to run from the time the right to bring an action for the land first accrued, such an instruction was substantially cured by other instructions given on the subject, as, for instance, if plaintiffs "and their predecessors have been in adverse possession openly for a period of more than ten years prior to the time when it is alleged the trespass complained of took place;" and "if you find * * * that the plaintiffs were in adverse possession of the lands * * * and had been in such possession for ten years continuously and uninterruptedly next preceding the entry of the defendant."

The objection to the giving of plaintiffs' requested instructions 7, 8, 9, 10 and 11 is also based on the claim that defendant at least is a tenant in common with plaintiffs, the previous rulings as to which would dispose of such claim. Defendant made no objection to the court instructing the jury that "I instruct you that a person in the actual and peaceable possession of land will be presumed to be the owner even in the absence of any proof of title and he may recover damages for trespass against any one who wrongfully invades his possession." That precludes it from claiming that other instructions along the same line are erroneous. Furthermore, the jury was instructed, without objection by defendant, as follows: "I instruct you that the term 'trespass' as used in this case means any transgression or offense against the law relating to the property of the plaintiffs whereby they are injuriously treated or damaged.

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

"And I further instruct you that if you find from the evidence that the defendant, by its agent or servants, has without right entered upon the lands of the plaintiffs, plowed up these lands or any part thereof, cut down trees, destroyed growing crops, plowed up or otherwise desecrated burial places on the land, it is guilty of trespass and your verdict must be for the plaintiffs."

It is also claimed that the reference in plaintiffs' instruction 7 to the forcible ejection of plaintiffs was erroneous. If this was an error it was harmless in view of the evidence that the acts committed by defendant were done in spite of the protest of plaintiffs and over their objection. It is also claimed that instruction 9 was erroneous because the meaning of the word "unlawfully" therein used was not explained. Counsel for defendant could have requested, however, as he did not, that the meaning of the word be explained to the jury. Consequently there was no error in the court's failure to do so. *Express Co. v. Kountze Brothers*, 8 Wall. 342, 353; 2 Thompson on Trials, Sec. 2341 and cases cited. It is further argued that instruction 10, in regard to the desecration of burial places, was erroneous in that it was a direction to find for plaintiffs if they had peaceable possession of them. The undisputed evidence showed that these graves were situated some distance within the outer boundaries of the land in dispute and in order to desecrate them a trespass would first have to be committed, or if no trespass was first committed then there could have been no desecration within the meaning of the instruction. Further than this, however, the instruction itself shows that it had reference to the matter of punitive damages, that is, that if the jury found for the plaintiffs from the evidence and under the law as given by the court then this desecration of graves, if also so found, might be considered in awarding damages.

The next instruction claimed by defendant to be erroneous is plaintiffs' instruction 17 which reads as follows:

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

“The Court instructs you as matter of law that where one person, or more than one who claim to own jointly, live upon a tract or piece of land which has definite boundaries, viz: the boundaries of which are marked by fences, or by stone or posts or other objects which show the extent and boundaries of such land that possession of the part of same draws to it the possession of the whole, and the person or persons so living upon such tract or piece of land are, in law, in possession of the whole thereof.”

This is objected to because it is argued that under it the jury could find from evidence of possession for the prescriptive period by plaintiffs of that part of the land to which it was admitted they had title that plaintiffs had actual possession also of that part of the land where the alleged trespass took place. But as the jury was instructed as to the actual possession of the latter part of the land we think the error, if any, was harmless.

Defendant further urges that there was error in the trial court's refusing to give its requested instructions 1, 3, 13 and 14 as originally requested and in modifying them and giving them as modified. Defendant pointing out no error in regard to these instructions, we shall not seek for any.

It is next claimed there was error in refusing to give defendant's instruction No. 4 which reads as follows:

“The evidence shows that plaintiffs and defendant claim from a common source of title, to wit: Henry Cornwell. The plaintiffs under an unrecorded deed dated the 14 day of June, 1875, neither actual nor constructive notice of which is shown to have been given to defendant, and the defendant under a later deed from the same party covering the same premises, which conveyance as well as all preceding conveyances under which defendant claims title are duly recorded as required by law.”

This instruction was given with the following modification:

“You are also instructed that possession of the premises is notice of the rights of the person in possession and is as truly notice as would be a recorded deed.”

Sylva v. Walluku Sugar Co., 19 Haw. 602.

It is also urged that it was error to give the instruction with the modification. In our opinion, however, the modification was proper.

Defendant requested an instruction (5) reading as follows:

"You are instructed that under Section 2380 of the Revised Laws of Hawaii an unrecorded deed of real property is void 'as against any such subsequent purchaser in good faith and for a valuable consideration, not having actual notice of such conveyance, of the same real estate or any portion thereof.' "

This was given with the following modification:

"But if the person holding the unrecorded deed is in the actual open possession of the land that then all persons have notice of the rights of the person in possession under the deed although it is unrecorded."

The claim is that this modification was misleading and erroneous and prejudicial to defendant, which claim we hold to be without merit in view of the failure to point out wherein it was so.

The court refused to give defendant's instruction 6 reading as follows:

"You are instructed that when a person has neither title nor color of title, to an enclosed tract of land, the fact that he during several years has used said land and things growing thereon from time to time, does not show actual possession. Such acts if isolated and only occasional may as properly be referred to continuous acts of trespass as indicating possession.

"To constitute possession such acts should be exclusive and under claim of title."

No error being pointed out in regard to this instruction we shall seek for none.

Error is also claimed in refusing to give defendant's instruction 7 reading as follows:

"The Court instructs you that if you are satisfied from the evidence that at the time of the transfer of that portion of the premises in the complaint described within which is contained the burial lot referred to in said complaint to the de-

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

fendant, said portion of said premises in said complaint described were not in the actual possession of the plaintiffs or their predecessors in title or estate, but were uncultivated and without buildings thereon, then and in that case defendant's deed to said premises being of record and plaintiffs' deed not being of record and plaintiffs not being in the actual possession of said property, any deed of conveyance held by said plaintiffs is void and of no effect as against the defendant, unless it is shown that defendant had actual knowledge of the existence of such prior unrecorded deed."

This was given as modified by the following language:

"You must consider the nature and use of the ground in order to judge who was in possession of it and cultivation might not be expected of burial places where it would be of other arable land, and that to use land for burial places is to be in possession of it if it be a part of premises of persons or family so using it."

In view of the evidence we fail to see that the modification prejudiced defendant.

It is next claimed that there was error in refusing to give defendant's instruction 9, which the court gave with the addition of the underlined words, as follows:

"You are instructed that even should you find from the evidence that the plaintiffs were the owners and entitled to the possession *and in actual possession* of the premises in said complaint described but that defendant relying upon its paper title thereto which covered the same property, made entry thereon in good faith under a valid claim of right without wantonness and violence, and in so doing, did actually injure certain property belonging to the plaintiffs, the measure of damages should be only the actual value of the property destroyed or used by the defendant, *and the damage to the premises. But in order to have acted in good faith in such case, the defendant must have had no knowledge or notice that the plaintiffs were in possession under claim of ownership.*"

It is admitted that there was no error if title had been acquired by plaintiffs by adverse possession, the previous rulings in connection with which dispose of this contention.

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

Defendant's requested instruction 11 was as follows:

"The jury are instructed that if they should find that defendant trespassed upon the lands of plaintiffs in the assertion of a supposed right, and without wrong intention, and without such recklessness as to show malice or conscious disregard for the rights of others, then you would not be justified in giving punitive or exemplary damages; to authorize exemplary damages, the jury must find that the defendant trespassed upon the land of plaintiffs, and that they were damaged thereby, and further that the trespass was done wantonly, wilfully, maliciously or with intent to injure plaintiffs' property or deprive them of its use; if the trespass was without wrong intention, but in the belief that they had a right to go upon the lands *with their sheep* and that the acts were done without malice or wilful intention to injure the plaintiffs, then the jury should assess only such damage as you shall find from the evidence to have been actually sustained prior to the bringing of the suit; that exemplary damages cannot be given except in *extreme* cases where the malicious intention *to wilfully* injure has been *clearly* shown; and unless the same has been proven to the satisfaction of the jury, by *a preponderance of* the evidence, no sum whatever as punitive, vindictive or exemplary damages can be awarded. The jury are further instructed that the plaintiffs are not entitled to any damage either as compensation or otherwise for any trespass other than that alleged in the petition, nor for any trespass occurring since the commencement of the action."

This instruction the court gave with the exception of the underscored words. Defendant contends that the striking out of the words referred to resulted in vitally changing the effect of the instruction upon the minds of the jury. With this contention we do not agree.

It is urged that instructions b, c and d given by the court of its own motion were erroneous. Instruction b deals with the duties of jurymen. The objection is that the language used was too broad. We find no merit in this objection. A part of instruction c refers to adverse possession, which it is argued was erroneous. In view of other instructions on the subject,

Sylva v. Walluku Sugar Co., 19 Haw. 602.

however, given both at the request of plaintiffs and defendant, we think the error, if any, was harmless. The record does not disclose any instruction d, and in any event no error is pointed out in connection with it.

Error is claimed in the court's refusing to give defendant's instruction 11a and in giving additional instructions after the jury had retired, but no error is pointed out in connection therewith and consequently we do not consider the matter.

The other alleged errors are involved in the foregoing.

Judgment affirmed.

R. P. Quarles (*Atkinson & Quarles* on the brief) for plaintiffs.

S. M. Ballou (*Kinney, Ballou, Prosser & Anderson* and *W. B. Lymer* on the brief) for defendant.

DISSENTING OPINION OF PERRY, J.

At the request of the plaintiffs and against the defendant's objection the following instructions were given:

No. 7. "I instruct you that a person in the actual, peaceable possession of premises is presumed to be there rightfully; and no one has a right to go upon the premises and commit acts of trespass thereon by forcibly ejecting such person, so in possession, or removing his property therefrom, against his will, unless the person so entering has some legal process from a Court of competent jurisdiction authorizing him so to do.

"And I further instruct you that the defendant in this case has no such legal process, and if you find therefore that acts of trespass were committed by the defendant on the property of the plaintiffs, your verdict must be for the plaintiffs.

No. 8. "I instruct you that if you believe from the evidence that the plaintiffs in this case were in actual and peaceable possession of the lands in question or any part thereof; and that the defendant committed acts of trespass thereon as defined in these instructions, your verdict must be for the plaintiffs.

No. 9. "I instruct you that in order to maintain an action for trespass, it is only necessary for the plaintiffs to prove that they were in the actual and peaceable possession of the property

Sylva v. Walluku Sugar Co., 19 Haw. 602.

upon which the trespass is alleged to have been committed; and that the defendant unlawfully interfered with such possession.

No. 10. "I instruct you that a person has no right to desecrate the burial places of the dead, when those burial places are in the actual and peaceable possession of another; and if you find from the evidence that the defendant desecrated such burial places on the lands in the possession of the plaintiffs, you are at liberty to award the plaintiffs exemplary or punitive damages.

"Provided it appears also that plaintiffs held, considered and regarded such burial places as sacred and kept and preserved them on lands in their possession as such burial places.

No. 11. "I charge you as a matter of law that it would be no good and sufficient excuse for acts of trespass committed by the defendant on the property in possession of the plaintiffs, that the defendant may have thought that the lands in question belonged to it, the defendant. If the plaintiffs were wrongfully in possession of the lands, and the defendant was entitled to such possession, the law provides a way for the defendant to obtain possession, but the law does not allow the defendant to enter upon the lands of the plaintiffs and commit acts of trespass thereon merely because the defendant thought it had a right so to do.

"But if defendant did thus trespass believing that it had a right to thus take possession of said lands, its acts were not done with an evil intent, and this would mitigate the measure of damages.

No. 18. "If you find from the evidence in this case that the defendant entered upon the lands in ~~question~~ dispute as shown by the evidence, or any portion of them under a claim of title, or deed, that such entry was, in law, wrongful unless such entry was made within the period of ten years from the date the title or right to such land was first vested in the party making such entry, the defendant, and within ten years from the time the right to such land accrued to the predecessor or predecessors, if any, under whom such right is claimed by the defendant, the giving of these instructions is assigned as error."

These instructions were apparently given on the theory that if plaintiffs were in peaceable possession at the time that defendant entered and ejected them, the defendant is liable,

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

irrespective of whether it had title or not, and that to make such an entry lawful the true owner must be armed with judicial process. Such is not the law. It is true that in trespass the title need not be tried; but it may be. A showing of peaceable possession on the part of the plaintiff is *prima facie* sufficient to entitle him to recover against a mere intruder. The party sued may, however, defend either by denying the acts of entry or dispossession or, admitting these, by justifying them by showing that they were rightfully done. The law, of course, does not encourage the commission of a breach of the peace. None is shown to have been committed in this instance. But the true owner of land cannot be held liable in damages for taking possession of that which is his own and which is in the wrongful though peaceable possession of another.

It may be that the use in Nos. 7, 8 and 11 of the word "trespass," defined as it was in No. 4, renders the instructions technically correct, but it could only appear so, even to a mind trained in the law, after careful re-reading and study. A jury of laymen would understand it, and not unreasonably, as an instruction to find for plaintiffs if they found the facts of peaceable possession in plaintiffs and forcible ejectment or removal of property by defendant unarmed with judicial process. The same is true of the use of the word "unlawfully" in No. 9. Upon being told, in No. 11, that "if the plaintiffs were wrongfully in possession of the lands and the defendant was entitled to such possession, the law provides a way for the defendant to obtain possession," what could the jury infer but that a mere entry was not that way and that to save itself from liability for damages the defendant, although the true owner, should have first instituted judicial proceedings? No. 10 has not even the merit, such as it is, of using the technical words "trespass" or "unlawful." It is unmistakably a direction to find for plaintiffs if they had peaceable possession and if thereupon defendant, although the true owner, made an entry. The evi-

Sylva v. Walluku Sugar Co., 19 Haw. 602.

dence was practically undisputed that plaintiffs were in peaceable possession immediately prior to the entry by defendant and that defendant had procured no judicial process for its protection. Under the instructions given, the plaintiffs' counsel had the right to argue to the jury that upon this state of the evidence and under the instructions there was but one course to follow, and that to find a verdict for plaintiffs. That I am not mistaken as to the meaning of these instructions as understood and intended by the presiding judge and counsel at the trial is further indicated by the fact that plaintiffs' attorney actually contends in this court, in justification of the instructions, that the law is that a true owner may not without rendering himself liable for damages enter upon his land in the peaceable but wrongful possession of another unless armed with judicial process. Nor is there anything in the remainder of the charge to cure these errors. They cannot be said to have been harmless, but may well have been responsible for the verdict rendered.

Instructions were, indeed, given defining to some extent adverse possession and directing the jury to find for the plaintiffs if it found that plaintiffs had acquired title by adverse possession and similarly if it found that the defendant had no title. These, however, merely presented other phases of the matter in the alternative. The charge as a whole was the equivalent of this: (1) "If you find that plaintiffs have acquired title by adverse possession and that defendant entered, verdict for plaintiffs; (2) if you find that the defendant had no title and entered, verdict for plaintiffs; (3) if you find that plaintiffs were in peaceable possession and that defendant had title and entered, *unarmed with judicial process*, verdict for plaintiffs, or (4), in other words, if plaintiffs were in peaceable possession and defendant entered, then, whether or not defendant had title, verdict for plaintiffs, provided only you find that defendant had no judicial process authorizing the entry; a

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

true owner cannot recover possession of his own land without liability for damages unless he first institutes judicial proceedings for the purpose."

It is suggested that the fact that plaintiffs' request No. 6, reading, "I instruct you that the person in the actual and peaceable possession of land will be presumed to be the owner, even in the absence of any proof of title and he may recover damage for trespass against any one who wrongfully invades his possession," was given without objection on the part of defendant cures the error. I cannot take this view. That instruction is somewhat clearer in its statement that the entry must be wrongful in order to justify a verdict for plaintiff; and while far from satisfactory it may be that standing alone the giving of it would be harmless and not require a new trial. The defendant cannot, I think, be charged with having practically waived objection to Nos. 7, 8, 9, 10, 11 by failing to object to No. 6. The latter is more general and the others more specific. No. 6 standing alone might pass unnoticed by the jury and cause no harm. The others, however, make clear and reiterate and emphasize the view that unless defendant was protected by judicial process his entry was wrongful irrespective of the true state of the title.

Another suggestion made in defense of No. 10 is that since the evidence would require a finding that the graves referred to in the evidence were located some little distance within the outer or southerly boundary of the land in dispute there could be no desecration of them without the defendant having first committed a "trespass" upon the land. The weakness of that position is that the defendant may have *passed over* the intervening strip just referred to, just as it might have desecrated the burial places, without being guilty of any trespass, for upon the evidence the jury could have found that the title was in the defendant and that the plaintiffs had not acquired any either by deed or by adverse possession. The evidence was sufficient

Sylva v. Wailuku Sugar Co., 19 Haw. 602.

to support, but not such as to necessarily require, a finding of adverse possession in plaintiffs.

In No. 18 the jury was instructed that defendant's entry was in law wrongful unless made within ten years "from the date the title or right to such land was first vested" in the defendant or his predecessors. This, of course, is not the law. One may take a deed of a piece of land and receive the title under the same and omit to enter into possession for twenty years thereafter, and yet not lose his title or right of entry provided only that no one else occupies the land adversely for more than ten years preceding the entry. See, for example, *Rose v. Smith*, 5 Haw. 377, 378, 379. What the judge should have said was that the entry was wrongful if made after an adverse holding by the plaintiffs for more than ten years preceding the entry, or, in other words, if made more than ten years after the right of action accrued. But he did not say that, and while but few words need have been changed in order to make the instruction correct the difference in meaning between the two forms is very great and the instruction as given clearly erroneous. The evidence was undisputed that the only deed under which defendant claimed was executed and delivered in 1894 and that its entry was in 1908, and the instruction, therefore, was the equivalent of a direction to find for the plaintiffs. Nothing is contained in the other instructions given which to my mind cures this error.

Whether or not other errors are disclosed by the record I need not say. In my opinion assignments Nos. 2, 3, 4, 5, 6 and 11 should be sustained, the verdict set aside and a new trial granted.

Estate of Lopez, 19 Haw. 620.

IN THE MATTER OF THE ESTATE OF ANTONE J.
LOPEZ, DECEASED.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 2, 1909.

DECIDED NOVEMBER 12, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

EXECUTORS AND ADMINISTRATORS—*suit to set aside fraudulent conveyance.*

An administrator of an insolvent estate has no authority to bring a suit to set aside a conveyance of real estate made by the decedent in fraud of creditors.

OPINION OF THE COURT BY HARTWELL, C.J.

L. L. McCandless, a creditor of the decedent, brought a petition in probate setting forth that the decedent died about March 9, 1908, testate; that the Bishop Trust Co., administrator with the will annexed, had collected assets to the amount of \$774.76, which, after deducting \$250.97, expenses of administration, left \$523.76 for the claims allowed which amounted to \$1007.48; that when the petitioner's claim of \$200 accrued Lopez was solvent owning property more than sufficient to pay all his debts, but thereafter, on February 27, 1905, he conveyed to one Foster in trust, for certain purposes, all his real estate, which the petitioner avers upon information and belief was of the value of over \$30,000, retaining personalty insufficient to pay his debts and that he was insolvent then and until he died; that the deed was executed in fraud of creditors including the petitioner; that the administrator has made no report of the land as an asset nor of the circumstances relating to the deed, and though requested by the petitioner to take necessary steps to realize upon the land for the benefit of creditors, has refused so to do, wherefore the petitioner prayed that he be ordered to take such steps as may be necessary to have the deed set aside or to subject the lands or so much thereof as may be necessary

Estate of Lopez, 19 Haw. 620.

to payment of petitioner's claim, and that it be ordered to be paid in full. The administrator demurred to the petition on the grounds (1) that it is a creditor's bill which the petitioner should have brought in equity and that the probate court has no jurisdiction; (2) that the administrator is estopped to attack fraudulent conveyances made by the decedent; (3) non-joinder of Foster the grantee.

The circuit judge reserved the question whether the demurrer should be sustained.

In several states referred to by the petitioner authority is given by statute to bring such suits, as in California, Ohio, New York, Vermont, Wisconsin and Massachusetts. The petitioner, while admitting that courts are not in accord on the question, submits that the following cases support his contention and are supported by sound reason. *Abbott v. Tenney*, 18 N. H. 109, 111; *Cross v. Brown*, 51 N. H. 486; *Cooley v. Brown*, 30 Ia. 470, 472; *McLean v. Weeks*, 61 Me. 277, 280; *Frost v. Libby*, 79 Me. 56; *Stewart v. Kearney*, 6 Watts 453; *Pringle v. Pringle*, 59 Pa. St. 286; *Bouslough v. Bouslough*, 68 Pa. St. 499; *Andruss v. Doolittle*, 11 Conn. 283; *Freeman v. Burnham*, 36 Conn. 469; *Bassett v. McKenna*, 52 Conn. 437; *Martin v. Bolton*, 75 Ind. 295. His contention is that in case of an insolvent estate the administrator is the representative of the creditors and that the heirs are not interested since all the property belongs to the creditors, so that it is necessary that the administrator have the right to sue which the creditors would have had if the decedent had not died. He urges that this is essential to the equitable apportionment of the assets after recovering back property fraudulently conveyed and that the administrator's suit avoids multiplicity of suits and prevents one creditor from obtaining preference over others since if one creditor brings the suit he is under no obligation to make other creditors parties and they might not know of it.

The administrator claims that by the overwhelming weight

Estate of Lopez, 19 Haw. 620.

of authority an administrator cannot bring suit to set aside a fraudulent conveyance although there are insufficient assets to pay the debts. Referring to statutes which confer such power, he asks what was their necessity if the power existed independently. With reference to the Maine cases he says that administrators have express authority by statute there and that the New Hampshire, Connecticut and Pennsylvania cases are of slight weight against the large preponderance of opposing decisions. He further says that at common law the administrator can only enforce rights which were open to enforcement by the decedent and that there is no reason for giving him powers which creditors can exercise; that an administrator's power to bring suits would not prevent multiplicity of suits or one creditor from obtaining a preference since every defrauded creditor has the same right and others could intervene and prevent preference; that the same objections existed prior to the fraudulent grantor's death so that creditors are in no worse position now.

Except in one of the Maine cases the decisions cited by the petitioner appear to relate to personal property and to be based mainly upon the doctrine that deeds of sale and transfers of personal property made in fraud of creditors are as against them absolutely void, and not merely voidable, and therefore that the administrator may bring an action at law for the property or its proceeds, treating the transfer as a nullity. In *Cooley v. Brown*, 30 Ia. 470, 472, the court said that the statutes requiring the administrator "to collect the assets and to pay them over to creditors required that whatever ought to be applied to payment of debts ought to be recoverable by the administrator representing the creditor's rights and that unless property voluntarily and fraudulently conveyed can be reached by the administrator the creditors would have to bring actions in their own names, involving multiplicity of suits and interfering with the singleness of the administration."

Estate of Lopez, 19 Haw. 620.

The administrator's right to sue is often based upon the ground that in case of an insolvent estate he is trustee for creditors and therefore ought to recover the property for their benefit. In *Gibbens v. Peeler*, 8 Pick. 253, and *Holland v. Cruft*, 20 Pick. 321, the right was based on the statute giving jurisdiction in equity "in all cases of trust arising under deeds, wills, or in the settlement of estates." The court in the *Holland* case (Shaw C. J.), referring to the statute making the estate of a debtor liable for all debts, say, "In order to enable executors and administrators to make such distribution among creditors * * * real estate which has been conveyed by the deceased to defraud his creditors may be sold by the administrator and for that purpose may be sued for and recovered by the administrator, although it is very clear from the principle above stated that the grantor himself could not void his grant made under the same circumstances." But the statute gave "explicit power to an executor or administrator to maintain an action for the recovery of such estate." *Ib.*, 329. The court further held that the suit could be maintained by creditors who had not obtained judgments against the administrator, and said that even if creditors could unite in a bill against the administrator and holders of property fraudulently conveyed that was no just reason why the administrator should not do the same thing in their behalf since creditors are often numerous, many of them interested to a small amount only, so that it might be difficult to bring them to act in concert, and if all should not unite the great object of the law, equal pro rata distribution, might be defeated or rendered difficult.

These considerations have weight but we are not at liberty to infer that the same conclusion would have been reached in the absence of the statutes. The administrator here may obtain a decree of "sale of any real estate of deceased persons for the purpose of paying their debts, whensoever the personal state of such persons shall prove to be insufficient for the pur-

Estate of Lopez, 19 Haw. 620.

pose " (Sec. 1855 R. L.), but this is not enough to authorize him to use the assets in litigation for the purpose of setting aside the decedent's deeds. The statute, Sec. 1850 R. L., authorizing orders "for the filing of inventories of the assets" by the administrator does not require real estate to be inventoried and probably refers to the inventory required by a statute of Hen. VIII., of "all the goods, chattels and credits of the deceased coming to his possession." Schouler, Sec. 229. In case of an insolvent estate there is no reason why a creditor whose claim has been allowed shall, in order to bring a suit, first obtain a judgment against the administrator and take out an execution returned nulla bona. *Merchants' & Miners' Transportation Co. v. Borland*, 53 N. J. Eq. 282, 296; *Haston v. Castner*, 31 N. J. Eq. 697, 700. The exceptions to the rule requiring a previous judgment which are recognized in *Smith v. R. R. Co.*, 99 U. S. 398, 401; *Case v. Beauregard*, 101 U. S. 688, 691, and *Sage v. R. R. Co.*, 125 U. S. 361, 376, properly include a case like that at bar.

If a debtor is living a creditor obtains, if he can, the lien of a judgment in order to bring a bill to secure for himself and creditors who intervene the exclusive benefit, to the extent of their judgment debts, of property fraudulently conveyed.

But in this Territory a judgment of itself gives no lien and a creditor gains nothing by obtaining it. Moreover, whatever action would lie either on the administrator's bond or for a devastavit, there is no right of action against the administrator to recover a claim which he has allowed.

A creditor's bill then against the grantee of a fraudulent conveyance would not be demurrable on the ground that the plaintiff had not obtained judgment against the administrator and taken out execution on which nulla bona had been returned.

The demurrer should be sustained.

A. G. M. Robertson for petitioner.

Holmes, Stanley & Olson for administrator.

Hawaiian News Co. v. McBride, 19 Haw. 625.

HAWAIIAN NEWS CO., LTD., A CORPORATION, v.
C. H. McBRIDE.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED NOVEMBER 10, 1909.

DECIDED NOVEMBER 12, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

GARNISHMENT—*examination of judgment debtor.*

The issuance of an execution is not a condition precedent to the making of an order, under R. L., Sec. 2117, for the examination of a judgment debtor.

Id.—*power of magistrates.*

District magistrates are authorized to make such orders in proper cases.

OPINION OF THE COURT BY PERRY, J.

Plaintiff obtained judgment against the defendant in the sum of \$55.91 on August 2, 1909, in the district court of Honolulu. On October 13, 1909, it filed in that court an application for an order that the judgment debtor be orally examined "as to any and what debts are owing to him and for such other and further rule, order or summons as the plaintiff may be entitled to in the premises." An order was thereupon made by the magistrate reciting the application and requiring the defendant to appear at a time and place named "to answer under oath all questions that may be put to you as to any and what debts are due and owing to you." On the return day the defendant moved to quash the order on the ground that it appeared "that no execution had issued and been returned on plaintiff's judgment and that the issuance and return of an execution on the judgment is a condition precedent to an order for an examination under Sec. 2117 of the Revised Laws," and the motion was granted. Plaintiff appeals to this court on points of law to ascertain the correctness of the ruling.

Hawaiian News Co. v. McBride, 19 Haw. 625.

The application and order were made under R. L. Sec. 2117. That section reads as follows: "It shall be lawful for any creditor who has obtained a judgment in any court, to apply to the court or a judge thereof for a rule, order or summons, that the judgment debtor shall be orally examined before a judge of such court, or such other person as such court or judge, if of a court of record, shall appoint, as to any and what debts are owing to him, and the court or judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of oral examination of witnesses under the law in that case made and provided." The proceedings and remedy provided for under this section are purely statutory. The extent of that remedy and the prerequisites to securing it are to be found in that section and possibly in other sections relating to the same subject. Neither in the language of Sec. 2117 nor in that of any of the other provisions of the chapter of which it is a part do we find any requirement that an execution must issue and be returned unsatisfied as a condition precedent to the filing of the application or the making of the order, or that an affidavit showing these facts must be filed with the application. The only requirements are that the applicant be a creditor who has obtained a judgment in any court and, inferentially, that the judgment remain unsatisfied in whole or in part. These latter facts appear upon the face of the application in this instance.

It is also suggested that "the district court not being a court of record or superior court of law is without jurisdiction to invoke the power granted by Sec. 2117," reference being made in support of the suggestion to Sec. 2127, R. L., which reads, "the provisions of this chapter and the powers conferred herein shall extend to all the common law courts of this Territory according to their jurisdiction." The "common law courts" mentioned are those which, in contradistinction to courts of equity,

Hawaiian News Co. v. McBride, 19 Haw. 625.

administer justice according to the principles and forms of the common law. Our district courts are in that class. The language of Sec. 2117 itself shows that it was intended to apply to courts not of record as well as to courts of record. The examination authorized by it may be "before a judge of such court or such other person as such court or judge, if of a court of record, shall appoint," the clear inference being that the examination must be before the judge himself if in a court not of record.

Defendant, who appears in this court in person, further contends that the section is unconstitutional in that "no provision is made for the establishment of facts necessary to give the court jurisdiction to act," and because it is "iniquitous and oppressive." What constitutional provision is violated is not stated. We see no force in the argument made and are aware of no reason for holding the statute unconstitutional. The provisions of Sec. 2117 and related sections are salutary and designed to aid in the enforcement of justice.

The ruling appealed from is reversed and the case remanded to the district magistrate for further proceedings not inconsistent with this opinion.

Thompson & Clemons for plaintiff.

C. H. McBride, defendant, in person.

No. 25. JIM AHOY v. J. H. RAYMOND. Exceptions from circuit court, first circuit. Petition for rehearing filed November 11, 1909. Decided November 13, 1909. Hartwell, C.J., Wilder and Perry, JJ. Per curiam: The parol evidence tending to show that the assignment of the lease was "as security only" was brought out on cross-examination by defendant, but the instructions leaving the jury at liberty to find, upon that evidence, that the assignment was inoperative as such,

Ah Hoy v. Raymond, 19 Haw. 627.

were given over defendant's objection. The evidence of absence of consideration for the bill of sale, while not admissible for the purpose of defeating the operation of the instrument, was admissible, with other evidence, in support of an attempt to show that the instrument was obtained by fraud. In the opinion read as a whole, with the syllabus, it is so held. The other grounds of the petition do not need mention. The petition for rehearing is denied without argument under Rule 5. *Cathcart & Milverton* for plaintiff. *A. G. M. Robertson* for defendant.

TERRITORY OF HAWAII v. SING HIGH.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 1, 1909.

DECIDED NOVEMBER 17, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

STATUTE—construction.

It is not clear that Sec. 1418 I of Act 96 S. L. 1907, relating to laundry licenses, gives power to the treasurer to impose conditions for granting such license but if it does the remainder of the act is not invalid provided it properly requires a certificate by the board of health.

STATUTE—constitutional.

The act is not unconstitutional in its requirement of a certificate by the board of health that the proposed location for a laundry is suitable.

OPINION OF THE COURT BY HARTWELL, C.J.

(Wilder, J., Dissenting.)

The defendant was charged with carrying on a laundry business without obtaining a license therefor which is required by Sec. 1418 I, Act 96 S. L. 1907. The defendant demurring to

Territory v. Sing High, 19 Haw. 628.

the charge on the ground that the act denies him equal protection of the laws in contravention of the fourteenth amendment, the court reserved the question whether the demurrer should be sustained or overruled. The act provides that the treasurer may issue licenses "to maintain and operate a laundry, dyeing or cleaning or dyeing and cleaning works upon such conditions as to location and otherwise as shall be set forth in the license," and that "such license shall not be issued except upon a certificate of the Board of Health setting forth that the location at which it is proposed to operate such laundry, dyeing or cleaning or dyeing and cleaning works is suitable for the purpose. The annual fee for a license for either a laundry, dyeing or cleaning or dyeing and cleaning works shall be Twenty-five Dollars." The defendant claims that the act "vests an unrestrained, unguided discretion both in the Treasurer and the Board of Health, to impose such purely arbitrary and burdensome conditions upon one who may desire to conduct the necessary and legitimate business of operating a laundry, which may not be applied to others similarly circumstanced, and which may absolutely prohibit him from carrying on his business, while others may be permitted to do so," and that "this case seems to be clearly within the rule laid down in *Tai Kee's* case, 12 Haw. 164, and cases there cited."

The act was probably not intended to authorize the treasurer to impose conditions for granting an application for a laundry license and it is only if such meaning is clear that the act ought to be declared invalid; but even if such power were given to the treasurer the remainder of the act would not therefore be invalid provided the certificate of the board of health is properly required.

In the *Tai Kee* case, 12 Haw. 164, it was held that a statute giving the minister of the interior power to refuse a license for a lodging house "in any location which in the opinion of the Executive Council is unsuited for the purpose, or which the

Territory v. Sing High, 19 Haw. 628.

Executive Council believes to be objectionable" was unconstitutional because it "delegates to the Executive Council arbitrary power with reference to lodging houses and contains nothing to guide or control the action of that body in this respect." The court remarked (p. 168), "But the action of the Board of Health is controlled within reasonable limits, or must be in order to be constitutional by the provisions of the statute, while the action of the Executive Council is not controlled at all." The act under consideration in the *Tai Kee* case, 11 Haw. 57 (Act 64 S. L. 1896), required the applicant for a lodging or tenement house license to secure from the board of health a certificate setting forth that an agent of the board had examined the house supposed to be used for the purpose and that it was in good sanitary condition and suitable to be used for the purpose, and stating the number of persons which by law could be lodged therein. It was held that one who had complied with the requirement was entitled to a license. The act now under consideration does not give to the board any power on the subject but requires its certificate that the location is "suitable for the purpose." The board has "general charge, oversight and care of the public health" (Sec. 988 R. L.) and the duty to "examine into all nuisances, sources of filth and sickness" and cause the same "to be prevented" as well as "destroyed or removed." (Sec. 994.) This general oversight and duty cannot be reduced to precise terms, for instance, what shall or shall not be a nuisance injurious to the public health is left to the board to determine. If like power were given to the treasurer it would be so incongruous with his official duties as to suggest capricious and unjust conduct such as would not be imputable to the board of health whose official duty in respect of certifying to laundry sites would presumably be done in performance of its general duty to care for the public health. A statutory provision would not be inappropriate requiring the board of health to see that none but suitable locations for laun-

Territory v. Sing High, 19 Haw. 628.

dries be licensed, the evident intent of such statute being that the locations conform to sanitary conditions.

King v. Tong Lee, 4 Haw. 335, held that an act was valid which prohibited public laundry business in Honolulu except in laundries erected by the minister of the interior and under the supervision and control of the board of health. The court remarked that under the general law giving the board power "to enter upon any land, building or vessel for the purpose of examining and preventing any nuisance or source of filth" it had "all the power over this business of washing * * * to enable it to carry out its functions as guardians of the public health;" and that laundries "are not manifestly and palpably nuisances. With proper drainage or sewerage whereby to dispose of the contaminated water and soapsuds, a laundry is far from being unwholesome or capable of affecting the public health. The want of sewerage in this town of Honolulu was undoubtedly the ground for the enactment of this law. The proper disposition of the contaminated water from either public or private laundries is a legitimate matter for the regulation of the Board of Health." But the court held that the object of the act, "however injudiciously expressed, is plainly to repress what in the opinion of the Legislature tends to the dissemination and propagation of disease."

While laundries may not be "manifestly and palpably nuisances" and with proper attention to sewerage and drainage they may not per se be "unwholesome or capable of affecting the public health," they may be injurious to the health of persons residing near them for clothing not disinfected is capable of carrying germs of disease, especially in an epidemic, and the risk of their being sprayed as in *Territory v. Ah Choy and Ah Tuck*, 17 Haw. 331, would render their proximity unsafe in a sanitary point of view.

We see no reason why the legislature could not properly regard a laundry as liable to be harmful to the public health and

Territory v. Sing High, 19 Haw. 628.

not in the same category as a lodging house, nor why the suitability of its location is not appropriately left for the board of health to determine. If at any time the board in determining such matters should go outside of its legitimate functions in caring for the public health and act arbitrarily it could be required to grant the certificate.

The demurrer should be overruled.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney, with him on the brief) for plaintiff.

A. S. Humphreys for defendant.

DISSENTING OPINION OF WILDER, J.

There is a clear distinction between occupations which may be regarded as harmful or dangerous in themselves, such as that of selling intoxicating liquors, and those which, like keeping a lodging house or doing a laundry business, are necessary to the welfare or convenience of the community, and which are harmful or dangerous, if at all, only because in the particular way in which they may be conducted. In the former no person has an absolute right to engage; in the latter all persons have an equal right to engage. The former may be regulated or restricted to any extent even to the extent of prohibition; the latter may be regulated only to a reasonable extent and with reference to the evils to be remedied or avoided. Where discretionary powers are placed in executive officers there should be something in the statute to guide or control the action of the officers. *Tai Kee v. Minister*, 11 Haw. 57, 63; 12 Haw. 164, 165.

In the present case the statute provides that one desiring to operate a laundry shall be unable to procure a license therefor without a certificate of the board of health that the location at which it is proposed to operate such a laundry is suitable for the purpose. Thus it is within the arbitrary power of the board of health to say that the proposed location of a laundry

Territory v. Sing High, 19 Haw. 628.

on King street is suitable while one on Fort street is not and thus allow a license to issue or not as it sees fit. Furthermore, there is nothing in the statute to prevent the board of health from saying to one person who desires to operate a laundry on one street that his location is suitable and to another who desires to operate on the same street that his location is not suitable. As I read the statute it contains nothing to guide or control the action of the board of health in regard to the suitability of a location.

It is urged that the court in the first *Tai Kee* case in 11 Haw., at p. 62, practically upheld such a provision in regard to lodging houses. The statute there required as a condition for obtaining a license that the applicant procure a certificate from the board of health certifying that the premises are in good sanitary condition and suitable to be used for the desired purpose. In that case then there was something in the statute to control or guide the action of the board of health, that is, that the building desired to be used as a lodging house should be in good sanitary condition and consequently suitable for the purpose. If it was not in good sanitary condition the applicant could make it so and then be entitled to the certificate. If the board of health had power in that case to arbitrarily withhold the certificate because in its opinion it was not suitable to have a lodging house on any particular street, regardless of any sanitary reason, it would be practically like the case at bar. I fail to see what the location of a laundry has to do with any evil to be remedied in connection with the carrying on of such a business. There are many places in Honolulu which without doubt would be regarded as unsuitable locations for laundries simply from an aesthetic standpoint, or because they were to be operated by orientals, or on account of other reasons not connected with sanitation, and which would be within the power of the board of health to so hold, and yet I think it is clear the legislature has no power to allow the board of health to withhold a certificate on such grounds.

Territory v. Sing High, 19 Haw. 628.

It should be borne in mind that the washing of clothes in connection with the laundry business can in any event only be carried on in the places designated under chapter 88 R. L. as amended. And it is the washing which has been heretofore regarded as the means of spreading disease. As pointed out in *King v. Tong Lee*, 4 Haw. 335, 338, "Laundries are necessary in every country, and the greater the population the greater the number. They are not manifestly and palpably nuisances. With proper drainage or sewerage whereby to dispose of the contaminated water and soapsuds, a laundry is far from being unwholesome or capable of affecting the public health. The want of sewerage in this town of Honolulu was undoubtedly the ground for the enactment of this law. (Ch. 88 R. L.) The proper disposition of the contaminated water from either public or private laundries is a legitimate matter for the regulation of the board of health." "The laundry business, like the lodging house business, is not harmful or dangerous in its nature." *Tai Kee v. Minister*, 11 Haw. 57, 63.

It is suggested that the statute should be held constitutional if possible and that in order to hold it so it should be presumed that the legislature intended that the board of health should refuse a certificate for sanitary reasons only. That same argument in regard to the executive council was made in *Tai Kee v. Minister*, 12 Haw. 164, 167, and this court answered it as follows: "But it is not sufficient that the executive council may act fairly under the statute or even that it has acted fairly in any particular case. The statute is unconstitutional because by its terms the executive council may act arbitrarily however unlikely it may be to do so."

It is further suggested that, from the fact that the board of health as such is designated as the body to issue a certificate that the proposed location of a laundry is suitable, thus giving the power to refuse a certificate if in its opinion the location is not suitable, the statute should be construed to mean that the

Territory v. Sing High, 19 Haw. 628.

certificate could only be refused if the location was unsuitable on account of sanitary reasons. The argument is that this follows from the general powers of the board of health in effect constituting it the guardian of the public health. The answer is, in the first place, that the legislature has not indicated in the statute that the suitability of the proposed location depended on sanitation, and, in the second place, that the board of health already had all the power necessary to regulate laundries if so conducted as liable to be dangerous to the public health. Chapters 78, 79 and 88 R. L. Furthermore, it appears that not only in the case of a laundry must the location thereof be suitable in the opinion of the board of health but also in case of a dyeing or cleaning or dyeing and cleaning works. Certainly in the last three cases whether a proposed location was suitable would not depend on anything to do with sanitation—no more than in case of a clothing store or a tailor shop. Consequently, to my mind, the legislature in using the word “suitable” did not intend to confine it to sanitation.’

In *The City of Richmond v. Dudley*, 129 Ind. 112, an ordinance purported to confer power on the common council to grant permission to an applicant to keep inflammable or explosive oils in quantities greater than five barrels at a time, “if the location,” among other things, should be deemed “suitable and proper.” The ordinance was held invalid, the court saying, among other things, “Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, can not well be imagined. The business of keeping, storing and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen. * * It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business;

Territory v. Sing High, 19 Haw. 628.

and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will so comply."

According to the definitions in Webster's and the Century dictionaries "suitable" means fitting, capable of suiting, appropriate. *White v. U. S.*, 69 Fed. 93.

To strike out of the statute all reference to the location of a laundry would necessitate holding the rest of the statute invalid.

I dissent from the opinion of the majority.

REMINGTON TYPEWRITER CO., INC., A CORPORATION
v. LEONARD G. KELLOGG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 8, 1909.

DECIDED NOVEMBER 19, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CONTRACTS—*right of action by creditor of promisee.*

G. & M. doing business as copartners under the firm name of "Hawaiian Office Specialty Company" purchased of plaintiff in 1905 certain merchandise for the purposes of the business and in 1907 sold to P. the property of the business, P. making no promise to pay the debts of the concern. P. conducted the business under the same name and subsequently sold the property to defendant, the latter agreeing to pay a certain note of \$2000 and "the other and remaining debts of the said Hawaiian Office Specialty Company." Plaintiff brought an action at law against defendant for the \$2400. Held, that if an action is maintainable at all by a creditor of the promisee against the promisor, the creditor not being privy to the contract or to the consideration, the very foundation of any right the creditor may have is the

Remington Typewriter Co. v. Kellogg, 19 Haw. 636.

promisor's contract and that in the case at bar plaintiff's claim was not one of the debts "of the Hawaiian Office Specialty Co." at the date of the agreement and therefore there was no promise by defendant to pay it.

OPINION OF THE COURT BY PERRY, J.

This is an action at law in which plaintiff claims of the defendant the sum of \$2400. The allegations of the declaration are that about October 1, 1905, plaintiff sold and delivered certain goods for the price named to William L. Gilluly and O. V. McCarthy, who at that time were doing business as copartners under the firm name of the Hawaiian Office Specialty Co.; that about January 4, 1907, D. S. K. Pahu, being then the owner of all of the right, title and interest of Gilluly and McCarthy in the property, business, assets and good will of said copartners as such entered with the defendant into an agreement in writing to which more particular reference is made below; that defendant on January 4, 1907, went into possession of the property so purchased by him from Pahu, on April 15 exercised the option contained in the agreement and purchased the property, and on April 18, 1907, formed a corporation to take over the property and business so purchased. The agreement recites that Pahu "is now the owner of that certain stock, store and business known as the Hawaiian Office Specialty Co. of Honolulu, a former copartnership, and is desirous of disposing of the same and is desirous of having" Kellogg "take possession of, management of and control of the same, with an option to purchase the same or at his option to incorporate the same or to form a corporation to carry on the same," and that Kellogg "is to assume the payment of a certain promissory note payable to the First National Bank of Hawaii for and in the sum of two thousand (\$2000) dollars" and continues: "Therefore, it is agreed herein and hereby that the said party of the first part transfers, assigns, turns over and sells to the said party of the second part, all the properties

Remington Typewriter Co. v. Kellogg. 19 Haw. 636.

of every kind, nature and description of the said Hawaiian Office Specialty Company, of Honolulu, with all their contracts, with all sums due and payable to them, and assigns all leases and other contracts, and gives immediate possession for the said properties and business to the said L. G. Kellogg, including also the properties in his hands or under his control that are held for sale on commission, so that the said L. G. Kellogg shall be enabled to manage, carry on, provide for the said business and all that pertains thereto, to the fullest and completest extent, without hinderance delays or interruption from any party or parties and the said L. G. Kellogg on his part hereby agrees to assume the payment of said Two Thousand Dollars (\$2000.00) note to the said First National Bank of Hawaii, and to take charge of, manage, and conduct the said business to the best of his ability, and under such managers, sub-agents and clerks as he may appoint and undertakes to carry out the plans of said option as he may deem best and for his advantage, and if the said Kellogg finally decides to exercise either the option of purchase or the option of forming a corporation to take over and manage and control said properties, that then he, the said Kellogg, party of the second part, is to provide for the payment of the other and remaining debts of the said Hawaiian Office Specialty Company, in addition to the said Two Thousand Dollars (\$2000.00) now assumed.

“It is also further understood and agreed that from the sales of properties now turned over, the running expenses are first to be paid out of the profits thereof or out of any sums thereof, belonging to said Kellogg, party of the second part, under this arrangement, and that next the rent of the office or store room is to be paid, and then the balance of the moneys which is realized from sales, are to be applied by the said Kellogg upon the payment of the said indebtedness assumed by him, and all other indebtedness of said Company.”

Defendant demurred on the grounds, among others, that the declaration does not state facts sufficient to constitute a cause

Remington Typewriter Co. v. Kellogg, 19 Haw. 636.

of action, that plaintiff, because not a party to the contract or privy thereto, has not capacity to sue, and that it does not appear from the declaration that the defendant promised to pay the debt mentioned. The demurrer was sustained. Plaintiff excepts.

The case stated in the declaration lacks, of course, some of the essential elements of a novation. Assuming for the moment that the defendant promised to pay the debt due by Gilluly and McCarthy to the plaintiff, the plaintiff was not a party to the agreement, did not assent to it and did not agree to the substitution of defendant as debtor or release the original debtors. The plaintiff's contention is that although there was no novation and although the plaintiff was not privy to the contract or to the consideration, still under the rule now prevailing in the majority of the states it has a right to maintain this action directly against the defendant for the recovery of the amount of the debt.

Upon the subject of contracts made by one person with another to pay to a third person and the right of the latter to maintain an action against the promisor, many of the cases are irreconcilable. Not only is there a conflict between the courts of different jurisdictions but also in some jurisdictions in the decisions of the same court. Courts differ not only in the conclusion reached but also in the reasoning adopted where the conclusion is the same. Some permit an action by a creditor of the promisee and refuse it to the sole beneficiary, that is, in cases where the promisee is not the debtor of the plaintiff, and others permit it to the sole beneficiary and not to the creditor. Whatever differences are to be found in the rules and in the reasoning none of the authorities go as far as to hold liable a defendant who has not promised to pay the claim of the plaintiff. "The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of a promisee is the promisor's contract. Unless there is a valid con-

Remington Typewriter Co. v. Kellogg, 19 Haw. 636

tract no rights can arise in favor of any one. Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise." 15 Harvard Law Review 767, 797. The defendant's promise may be express or it may be implied from the circumstances, as, for example, by the acceptance of a deed in which it is specifically provided that the conveyance is made upon the understanding that the grantee is to pay certain debts of the grantor. The promise, too, need not be in express terms to pay a particular debt named. Whatever the language used, however, it must clearly appear that the contract was to pay the debt, as, for example, by designating a class within which the particular debt falls. No case has been called to our attention and we are aware of none in which it has been held that a promise by the purchaser to pay the debts of a going concern is to be inferred from the mere fact of the purchase of the property of that concern. Such promise cannot be said to have been within the contemplation of the parties to the transaction. Ordinarily no reason exists in equity or good conscience why the owner of a business may not sell the property used in that business without exacting from the purchaser a promise to pay its debts. The seller may be well able to meet them out of other property and where he is not and the transfer is to be regarded in law as in fraud of his creditors the latter have their remedy by a bill in equity to set aside the transfer.

Assuming that the words "to provide for the payment of" are the equivalent of the words "to pay," the only promise in this case is to pay "the other and remaining debts of the said Hawaiian Office Specialty Company in addition to the said \$2000 now assumed." Plaintiff's claim is not specifically mentioned. Is it included within the class here designated? We think that it is not. The "Hawaiian Office Specialty Company" had no existence as a separate entity although Gilluly and McCarthy did business as partners under that name and

Remington Typewriter Co. v. Kellogg, 19 Haw. 636.

Pahu in turn apparently did the same. The "Hawaiian Office Specialty Company" as such had no debts and the debts referred to in the contract as those "of the said Hawaiian Office Specialty Company" were those due by the person who at that time was doing business under that name and who had contracted them in connection with that business. When Pahu bought of Gilluly and McCarthy he assumed and was under no obligation to pay the debts of that business. The debt due plaintiffs ceased at that time to be a debt of the business. It did not become Pahu's debt. The debts assumed by Kellogg, therefore, in the clause in question would at most be those owing by Pahu at the time of such assumption and incurred in connection with that particular enterprise and did not include the claim now sued on.

The exception is overruled.

C. F. Clemons (*Thompson & Clemons* on the brief) for plaintiff.

R. P. Quarles (*Atkinson & Quarles* on the brief) for defendant.

TERRITORY OF HAWAII v. MATSUBARA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 9, 1909.

DECIDED NOVEMBER 19, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

STATUTE—*constitutional*.

Act 96 S. L. 1907, requiring a license fee of \$5 for a fishing boat with a beam of 30 inches or more, is not in conflict with Sec. 95 Organic Act, declaring the fisheries in the sea waters of the Territory not included in any fish pond or artificial enclosure free to all citizens of the United States, or under Sec. 55

Territory v. Matsubara. 19 Haw. 641.

prohibiting the granting of special privileges or immunities, or because it is discriminatory class legislation or unreasonably classifies boats required to be licensed or prohibits a useful occupation or denies equal and uniform protection of the law, although at the date of the act native Hawaiian outrigger canoes with a beam of less than 30 inches had mainly been replaced in fishing for profit with Japanese boats with a beam of 30 inches or more, since the act applies to all who use such boats for profit.

OPINION OF THE COURT BY HARTWELL, C.J.

The defendant was convicted and fined \$5 and costs for having on September 2, 1909, "unlawfully and wilfully used a certain boat, to wit, a certain sampan, having a beam of 30 inches or more, for the purpose of fishing for profit, without first obtaining a license for said boat as by law required, contrary to Act 96 of the laws of the Territory of Hawaii of the session of 1907." It was stipulated at the trial that the defendant used the boat for the purpose of fishing for profit without having obtained a license; that he was not a citizen but was a Japanese subject now and for many years past resident in Hawaii. The defendant offered evidence, which upon objection was ruled out, of a witness who had been a fisherman for profit here for the last thirteen years, to the effect that the witness did not think that fishing for profit could be carried on without boats; that thirteen years ago only a small number of boats used for fishing for profit were owned, manned or used by Japanese or Chinese but that native Hawaiians then used a large number of boats, mostly outrigger canoes with a beam of less than 30 inches; that Japanese and Chinese boats steadily increased in number year by year until about five years ago and have since then remained about the same in number, while the number of native boats has steadily decreased until in April 1907, the date of the act, when there were about 200 boats with a beam of 30 inches or more operated by Japanese, with the exception of two or three Chinese boats, and that no others but

Territory v. Matsubara, 19 Haw. 641.

Japanese and Chinese then used boats with a beam of 30 inches or more. The deputy county attorney admitted that there were more Japanese and Chinese engaged in the business of fishing for profit in boats of 30 inch beam or more than persons of any other nationality. The defendant excepted to the exclusion of the testimony and to the judgment as contrary to law. He contends that Act 96 is unconstitutional and void under Sec. 95, Organic Act, repealing the laws of the Republic of Hawaii, which conferred exclusive fishing rights upon any person and declaring that the fisheries in the sea waters of the Territory not included in any fish pond or artificial enclosure shall be free to all citizens of the United States, and under Sec. 55 which prohibits granting special privileges or immunities, and that the act is in violation of the fourteenth amendment in denying equal protection of the laws to persons engaged in fishing for profit in boats of 30 inches beam or more, while those who use a boat of less than 30 inches beam are not required to pay a license, this being claimed to be an arbitrary and unreasonable classification.

Sec. 95, Organic Act, repealed "all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons" and declares that "all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial enclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this act unless established as hereinafter provided," and Sec. 96 provided procedure for establishing such vested rights and for their condemnation, when established, "to the use of the citizens of the United States."

We do not infer from this legislation that congress intended that the business of fishing for profit in the sea waters of the Territory should be free from police regulation or taken out of the taxing power of the Territory, the object of the provisions

Territory v. Matsubara, 19 Haw. 641.

cited being to do away with exclusive private rights of fishery in those waters. In this view there is no occasion to consider the defendant's claim that the act deprives him of treaty rights.

The defendant claims that the act cannot be justified as a police measure and if justifiable at all it is upon the ground that it is as a law for raising revenue; that the occupation of fishing for profit being not only an innocent one but beneficial to the public in supplying it with beneficial and necessary food "it is beyond the power of the legislature to make the act criminal or to punish the act of fishing for profit as a criminal offense." His brief says:

"The principal object of the Act in question is to discourage Orientals from following the occupation of fishing for profit, and encourage others to do so. It is an Act of discrimination against Orientals, and in favor of others engaged in the same occupation, and, in this view, it is unconstitutional within the rule laid down by the Supreme Court of this Territory, in the case of *Territory v. Ah Choy*, 17 Hawaiian, 331."

In that case we refer to the duty of the court to consider the real motive of such police ordinances and to declare them void "when it is apparent that they are based upon anti-Chinese grounds and are a device for removing the competition or the presence from the community of persons of Chinese nationality," citing with approval *Yick Wo v. Hopkins*, 118 U. S. 356; *Ho Ah Kow v. Nunan*, Fed. Cas. 6546, and *State v. Taft*, 118 N. C. 1190. But we held that the "14th Amendment is not intended to secure immunity from such practice on the sole ground that it is indulged in by Chinese only."

Many citations are made and relied upon by the defendant in support of his contention that the act is "discriminatory and amounts to unequal taxation" in that it "taxes some boats used for a special purpose and not others used for the same purpose" and that "it was intended to help one class of people and impose a burden upon another class following the same occupa-

Territory v. Matsubara, 19 Haw. 641.

tion." As stated in *Territory v. Pottie*, 19 Haw. 99, which is also cited:

"These quotations contain general principles which are well understood and have been frequently approved. The usual difficulty is in the application of these rules to particular statutes. That legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate is not prohibited is but another way of saying that classification is allowable if based upon some reasonable ground. But it must be remembered that differences which would serve for a classification for some purposes do not because of that fact furnish a reason for a classification for all legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. The legislature cannot adopt an arbitrary classification, for it must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes so as to disclose the necessity of different legislation in respect thereto. Any law based upon such a classification must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class."

But the fact that at the date of the act mainly Japanese and Chinese used boats of the kind requiring a license does not of itself justify the inference that the act was aimed against Japanese or Chinese for it embraces persons of all nationalities who engage in the business of fishing for profit in such boats. The act imposes license fees upon custom house brokers and the fact that no Orientals are brokers would not show that whites had not uniform protection of law. So of the vocation of barbers, garage keepers, etc.; named in this act, their race or nationality would be immaterial.

The reason for requiring boats of the precise size named to be licensed and exempting those of smaller dimensions is not apparent, but the object of placing any limit upon their size might well be that it would be injurious to the public interest to allow unlimited fishing and it does not appear that the limit

Territory v. Matsubara, 19 Haw. 641.

named is unreasonable, or, it might well be, in view of the difference in the fishing capacity of the two classes of boats, to place the burden of taxation upon those best able to bear it.

The cases cited by the plaintiff, taken from 25 Cyc., 603 et seq., sustain the statements that the legislature may "for the purpose of revenue impose a license tax on any business or occupation whatsoever and the validity of the act or ordinance imposing the tax will be upheld by the courts;" that "an act or ordinance imposing a license purely for regulation will be upheld unless it appears that the occupation or business taxed is of such a nature as not to require regulation of supervision" (p. 604), although the tax "must not amount to a prohibition of any useful or legitimate occupation if levied under the police power;" that (p. 606) "if the tax is uniform as to all persons engaged in the particular business or avocation taxed * * * the constitutional requirement of uniformity is not violated;" that "it is well settled that imposing a license tax and classification for such tax according to the amount of business done or according to the amount of capital employed therein does not offend the constitutional provision that requires uniformity of taxation," and (p. 609) that "the fact that the license tax on a given occupation may be graduated by valuation does not make it a proper tax or invalidate the act or ordinance imposing it." Thus license fees are sustained which distinguish between wholesaler and retailer. *Knisely v. Cotterel*, 196 Pa. 614; *Commonwealth v. Clark*, 195 Pa. 634, and in *Morgan v. Commonwealth*, 98 Va. 812 (35 S. E. 448), where the licenses were distinguished as to fishermen according to the depth of the water in which they fished; *Howland v. Chicago*, 108 Ill. 496, taxing livery stable keepers in proportion to the number of carriages kept for hire; *Fulgum v. Nashville*, 76 Tenn. 635, imposing a fee on hotel keepers of \$40 and one per cent. of the rental value of the hotel if having not less than ten rooms; *State v. French*, 17 Mont. 54, sustaining a statute imposing a

Territory v. Matsubara, 19 Haw. 641.

license fee of \$25 on a male laundryman employing one or more persons, while imposing a fee of but \$15 for a steam laundry, was sustained notwithstanding the fact that Chinamen were engaged in hand laundry business.

None of the plaintiff's citations appear to be in conflict with those above mentioned.

We cannot say that the act under consideration is void as discriminatory class legislation or for unreasonably classifying boats required to be licensed or for prohibiting a useful occupation or denying to the defendant equal and uniform protection of the law, or that it conflicts with Secs. 55 or 95 of the Organic Act or with the fourteenth amendment of the United States constitution.

Exceptions overruled.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney with him on the brief), for the Territory.

R. P. Quarles (Atkinson & Quarles on the brief) for defendant.

IN THE MATTER OF JOHN ATCHERLEY, AN ALLEGED INSANE PERSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 15, 1909.

DECIDED NOVEMBER 20, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CERTIORARI—*grounds for review.*

Certiorari lies to set aside only such proceedings as are absolutely void; not to determine the correctness of findings of fact or the sufficiency of the evidence to support the findings.

Id.—*no invalidity found.*

Upon the facts stated in the opinion, no invalidity is found in the proceedings of the lower tribunal.

In re Atcherley, 19 Haw. 647.

OPINION OF THE COURT BY PERRY, J.

This is an appeal by Dr. John Atcherley from an order of a circuit judge dissolving a writ of certiorari which had been issued to the chairman of the commissioners of insanity commanding him to send to the circuit judge a certified copy of the proceedings had before the commissioners in the matter of the appeal of the present petitioner to the end that their validity might be ascertained.

The petitioner was taken into custody on a warrant issued by the district magistrate of Honolulu and based upon an affidavit sworn to by the sheriff of the city and county of Honolulu. After due hearing the magistrate found that the petitioner was insane and that it would be unsafe to allow him to be at large, entered judgment to that effect, issued a commitment authorizing detention at the insane asylum until the patient becomes sane or is discharged according to law and sent to the chairman of the commissioners of insanity a certificate of his findings and judgment together with a brief statement of the facts upon which his judgment was based. From that judgment the petitioner appealed to the commissioners of insanity. The latter, after hearing, came to the same conclusion on the merits as had the magistrate and entered judgment dismissing the appeal and committing the petitioner to the custody of the superintendent of the asylum.

Under the present writ the petitioner attacks the constitutionality of Act 149 of the Laws of 1909 under which his examination and commitment were had. All of the grounds and arguments now urged, however, on this point were presented upon certain questions reserved by the circuit court, first circuit. See *In re Atcherley*, ante 535. It is there held that the act is not unconstitutional for any of the reasons stated. The questions there decided will not be now re-examined.

As to the alleged invalidity of the proceedings before the commissioners. The hearing occupied parts of three days. Nine

In re Atcherley, 19 Haw. 647.

witnesses were examined on behalf of the Territory and seventeen on behalf of the petitioner. The latter was present in person throughout the trial and heard all of the evidence adduced, conducted his own case, declining to employ counsel, examined his own witnesses and cross-examined those produced against him. He now complains that the commissioners did not permit him to produce certain other witnesses whom he desired to have examined, on the ground, as he states, that the commissioners were under the act without power to compel the appearance of such witnesses or to administer oaths to them when produced; and also that he was not permitted to argue in his own behalf at the close of the evidence. Assuming for the moment that the commissioners were without power to administer oaths or to compel the attendance of witnesses, we have already held (*ante* p. 535) that due process of law does not require more than one trial, that that requirement was fully complied with by the trial had before the magistrate and that the petitioner if he elected to appeal to the commissioners must accept a hearing such as is provided for by Act 149. We prefer, however, to refer to some of the specific objections made in the attempt to show that the proceedings were invalid.

The return shows that the petitioner at the close of the evidence "argued and testified" for two and a half hours. He cannot reasonably complain that more time was not allowed him. The return also shows with reference to the four persons whom the petitioner named as proposed witnesses that the attorney representing the Territory upon the request being made for such witnesses admitted that they would testify to the effect claimed by the petitioner. No further request for their appearance was made. The petitioner appears to have accepted the admission in lieu of the testimony itself. Moreover, without specifying it, the evidence of the proposed witnesses as outlined at the time by the petitioner was immaterial and inadmissible. The same is true of the evidence of other persons of whom no

In re Atcherley, 19 Haw. 647.

mention is made in the return but whom, it is claimed in the brief, petitioner was not permitted to call as witnesses. The refusal of the commissioners to cause the production before them of a patient at the asylum who was claimed by the petitioner to be "a real paranoiac" and to summon a chemist, not named, to test, presumably in the presence of the commission, certain drugs of a kind claimed to have been administered at the asylum to the petitioner was not even erroneous. Whether the evidence adduced was sufficient to sustain the findings of the commissioners and whether the commissioners committed an error of judgment in making those findings are matters which are not reviewable on certiorari. See, for example *Mattos v. Wilcox*, 10 Haw. 186, 187; *Aldrich v. First Judge*, 9 Haw. 470, 471. No question is made about any jurisdictional facts. The failure of the commissioners to send in obedience to the writ a transcript of the evidence becomes therefore immaterial.

The return shows that the petitioner had a full and fair trial before the commissioners. There was no invalidity in the proceedings.

The order appealed from is affirmed.

Petitioner pro se.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney, with him on the brief),
for respondent.

Territory v. Toyota, 19 Haw. 651.

TERRITORY v. TOYOTA.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

ARGUED NOVEMBER 8, 1909.

DECIDED DECEMBER 1, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

CONSTITUTIONAL LAW—*auction license fees.*

Section 1343, R. L., is not unconstitutional in its requirement for an auction license of a fee of \$600 for the district of Honolulu and \$15 for each other taxation district.

AUCTIONS AND AUCTIONEERS—*public auctions.*

Upon the agreed facts the defendant conducted a public auction within the meaning of the statute.

OPINION OF THE COURT BY PERRY, J.

(Wilder, J., dissenting.)

Defendant appeals on points of law from a conviction before the district magistrate of Honolulu of the offense of "selling goods, wares and merchandise at auction in the district of Honolulu without first obtaining a license as auctioneer." Section 1343 of the Revised Laws requires an annual fee for a license to sell goods, wares and merchandise or other property "at auction," naming a fee of \$600 for the district of Honolulu and \$15 for each other taxation district. The defendant's points are that under that section licenses are required only for sales at *public* auction, that the facts proved constitute no offense and that the statute improperly discriminates between residents and citizens of the district of Honolulu and those of the other districts and is contrary for that reason to the 14th amendment of the constitution. The only other portion of the statute which can be invoked as throwing any light on the meaning of the words "at auction" in section 1343 is the requirement in Sec. 1345 that the bond given by each auctioneer "upon receiving an auction license" shall contain a pro-

Territory v. Toyota, 19 Haw. 651.

vision "that he will not sell goods, wares, merchandise or other property except at public auction." It is not clear that there is any difference in meaning between the words "at auction" and the words "at public auction." Whatever difference, if any, there may be, it may be assumed for the purposes of this appeal that, as contended for the defendant, it is a *public* auction which is contemplated by the statute and the question, then, is whether on the evidence the defendant conducted a public auction.

The evidence consisted merely of an agreed statement of facts, that statement being as follows:

"That the Hawaiian Fisheries, Limited, is a domestic corporation, organized under the laws of Hawaii, and doing business at Honolulu.

"That said corporation handles and sells for a large number of fishermen, on commission, fish caught by such fishermen, and does so daily, in the following manner:

"The catch, as soon as it comes in by boat is loaded into wagons and carried to the Fish Market, in Honolulu, and there an agent of said Hawaiian Fisheries, offers it in basket lots, each basket containing about from 70 to 100 pounds, to the retail dealers of fish only, and the one bidding the highest price for same, there and then becomes the purchaser. That at such sales no bid is received except from such retail dealers, or the persons conducting fish tables on the said market. That fish is highly perishable and must be quickly disposed of after being brought to market, and that the above plan is followed to facilitate the sale of fish when brought to market. The said corporation, if it cannot sell the fish brought to market in the manner above indicated, then must, under contract with the fishermen who are its patrons, sell such fish at retail. That the defendant, was at the time and place stated in the complaint against him, as agent for the said corporation, selling and offering for sale, fish in basket lots, in the manner above indicated, and not otherwise. That there are about thirty-three proprietors of fish tables on said market, who with their assistants, buy fish from said corporation, in manner as above stated.

Territory v. Toyota, 19 Haw. 651.

"Neither the defendant, nor the said Hawaiian Fisheries Company, Limited, has obtained a license as Auctioneer, in and for the City and County of Honolulu, for the fiscal year commencing July first, 1909, or any part of said year. That the said Hawaiian Fisheries Company, Limited, has obtained and been operating under a Merchandise Broker's license, and now has such license."

That the defendant conducted an *auction* sale is beyond doubt. It was a sale by competitive bids where the seller invited and excited competition and disposed of the property to the person who made the highest bid. The practice of conducting such sales "is said to have originated with the Romans who gave it the descriptive name of *auctio*, an increase, because the offered property was sold to him who would offer the most for it." *Crandall v. State*, 28 Oh. St. 479, 481. "The essential part is the selection of a purchaser from a number of bidders," says Bouvier after defining an auction as being "a public sale of property to the highest bidder." Whether the sale be "by the inch of candle" or at Dutch auction or in the method ordinarily pursued at the present time, competition is a necessary element (*Crandall v. State*, supra, 482) and it is that which distinguishes a sale at auction from other sales where the attempt to sell and to agree on a price is made with but one prospective purchaser at a time.

Does the fact that bids were accepted from retail dealers of fish, and from no others, place the transactions without the class of sales at public auction within the meaning of the statute? We think not. In the word "auction" itself there is nothing to lead to the opposite conclusion. In so far as the word "public" imports publicity, a sale free from concealment, open to the knowledge or view of all, as opposed to one in private or unknown to the community at large, that element clearly existed in the transactions under consideration. There was no attempt at concealment or secrecy. Aside from this element the word "public" is susceptible of various shades of meaning.

Territory v. Toyota, 19 Haw. 651.

It may be so used as to have reference to all of the members of a community, state or nation, or as referring to the community in general or a considerable portion of it. It is in the latter sense, we think, that it is used in the statute in question. The sale was none the less public because of the exclusion from bidding of the class which was excluded. The sale was of lots of fish varying from 70 to 100 pounds each. The class admitted to bid, the retail dealers of fish, included practically all who would be likely to offer bids. The main purpose of auction sales is to obtain the best financial returns for the owners of the property sold. Some measure of discretion is vested in auctioneers as to the precise methods to be pursued in attaining that object, for example, bids need not be accepted from minors or from persons irresponsible either financially or mentally or from drunken persons or from one offering in bad faith or even from one making but a slight raise in his bid over the bid last announced. See *Taylor v. Harnett*, 55 N. Y. Suppl. 988, 990, 991.

It may well be conceived that an auctioneer may in good faith and in the exercise of a proper discretion deem it to be to the best interests of his principals, in a series of sales such as described in the agreed statement, to refuse to sell to the consumers who in rare instances might possibly appear and bid to the financial detriment of the retail dealers who in large numbers, and regularly, attend such sales and purchase the great bulk of the fish. If the construction contended for by the defendant is correct an auction sale of miso and soyo, Japanese sauces, excluding all but Japanese, a sale of books excluding all illiterates, a sale of carriage lamps excluding all who have no carriages, a sale of automobile parts excluding all who do not own or operate automobiles, and a sale of fat steers in lots of twenty-five to ranchers and butchers only, would not be sales at public auction. It seems incredible that such was the intention of the legislature. The statute should be given a

Territory v. Toyota, 19 Haw. 651.

reasonable construction, not permitting of easy evasions with no practical lessening of financial results to the auctioneer.

As to the question of unconstitutionality, it is well settled in this jurisdiction that "the legislature in a matter of this kind may classify or discriminate if the classification or discrimination is based on some reasonable ground which is furnished by population in some instances." *Trust Company v. Treasurer*, 19 Haw. 262, 263. See also *Territory v. Pottie*, Ib. 99, 104. "Where natural distinctions require discrimination not to discriminate works injustice." *Robertson v. Pratt*, 13 Haw. 600. "Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected." Ib. 602. In *Trust Company v. Treasurer*, supra, referring to a contention that a statute was unconstitutional which required a license fee of \$750 for a banking business in Honolulu, of \$500 for Hilo and of \$250 for all other parts of the Territory, said: "There is a natural distinction between the different places in this Territory where banking may be carried on. This, of course, allows the legislature to reasonably and fairly classify the amount of the license fee required for banking. Even if the judgment exercised by the legislature in a matter of this kind is in our opinion unwise or perhaps oppressive, still that is not of itself sufficient to declare that a statute passed pursuant to such judgment violates the equal protection provisions of the constitution." The same may be said with reference to the business of auctioneering. The same distinctions exist. The great bulk of the business of the Territory is done in Honolulu. It is not for us to say whether we would make the difference in the amount of license fees in this case as large as the legislature has made it. It is sufficient that we cannot say that the difference is unreasonable or that the statute is unequal or arbitrary in its operation. Our conclusion is that as far as this objection is concerned the statute is valid.

The judgment appealed from is affirmed.

Territory v. Toyota, 19 Haw. 651.

F. W. Milrerton, Deputy City and County Attorney (J. W. Cathcart City and County Attorney with him on the brief) for plaintiff.

R. P. Quarles (A. L. C. Atkinson with him on the brief) for defendant.

DISSENTING OPINION OF WILDER, J.

It appears from the agreed facts that defendant as an agent of the Hawaiian Fisheries Co., Ltd., a domestic corporation engaged in handling and selling on commission for a large number of fishermen fish caught by such fishermen, offered for sale fish in basket lots, each basket containing from seventy to one hundred pounds, to the highest bidder among thirty-three retail dealers of fish or owners of fish tables at the fish market, no bids being received from any other persons. It is well settled that the highest bona fide bidder of those who care to bid at an auction sale is entitled to receive the goods offered for sale. As stated in Bouvier's law dictionary, "A public sale is one made at auction to the highest bidder," and that "an auction is a public sale of property to the highest bidder." In this case it appears that the bidding was limited to about thirty-three persons and that bids from other persons, even if higher than any made by any one of the thirty-three, would not have been received or accepted. It follows, therefore, that this was not a sale to the highest bidder from among those who might choose to bid and consequently there was no sale at auction for which a license is necessary under the statute. The statement in Black's law dictionary applies, namely, that "if there can be such a thing as a private auction it must be one when the property is sold to the highest bidder but only certain persons or a certain class of persons are permitted to be present or to offer bids." The point to determine is not what the legislature actually intended but what its intention was as disclosed by the statute.

The argument made on behalf of plaintiff that the conten-

Territory v. Toyota, 19 Haw. 651.

tion of defendant if upheld would only invite evasions of the law as, for instance, an auction sale where bids are received from all persons except hackmen, is without merit, as it does not necessarily follow that in case of the instance cited, which would be simply a scheme to evade the law, the same result would be reached. In this case, notwithstanding the intimation of the majority to the contrary, there is nothing to suggest, and the agreed facts do not permit the inference, that the method pursued in selling the fish was devised simply to evade the statute relating to the licensing of auctioneers, as it appears that defendant's principal is at present operating under a merchandise broker's license.

For the foregoing reasons I therefore dissent from the majority.

JOHN D. PARIS v. JEREMIAH KUHHAUPIO, ANTONE PERRY AND MANUEL FERNANDEZ.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

SUBMITTED NOVEMBER 20, 1909.

DECIDED DECEMBER 1, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

APPEAL AND ERROR—*finding of fact by a court jury waived.*

There being evidence to sustain a finding of fact made by a circuit court jury waived, it will not be reversed.

OPINION OF THE COURT BY WILDER, J.

In an action to quiet title to a piece of land in Kona, Hawaii, the circuit court, jury waived, found for plaintiff and entered judgment accordingly. Both parties claim through one Hakuole who purchased from the patentee. In 1893 Hakuole deeded the land to one Burgess, the deed not being recorded until November 11, 1905. Hakuole died intestate on March 7,

Paris v. Kuhaupio, 19 Haw. 657.

1905, leaving as his sole heir his sister Miliama, who, on April 8, 1905, deeded the land to her son Kuhaupio, the principal defendant, the latter recording his deed a couple of days thereafter. The sole question of fact was whether at the time Kuhaupio received his deed from Miliama he had notice of the unrecorded deed from Hakuole to Burgess. The court found as a fact that he had such notice and filed an opinion in writing to that effect, defendant excepting thereto as being against the law and the evidence and the weight of the evidence, which is the only exception brought up.

At the outset plaintiff contends that this exception is too general and indefinite to be considered. Whether that is so we need not say, as in any event the exception in our opinion has no merit.

Plaintiff testified that defendant Kuhaupio told him in May, 1908, in Honolulu, that Hakuole had told him that he had deeded the land to Burgess. Kuhaupio denied that he ever said any such thing to plaintiff, although admitting that he and plaintiff did have a conversation at that time in reference to the land. It is well settled that findings of fact by the court jury waived will not be set aside if there is evidence to sustain them. See the cases cited in the note to R. L. Sec. 1684. There was evidence to sustain the findings of fact and consequently we cannot disturb it.

Exceptions overruled.

Kinney, Ballou, Prosser & Anderson for plaintiff.

W. W. Thayer for defendants.

Booth v. Schnack, 19 Haw. 659.

ELIZABETH K. BOOTH *v.* J. H. SCHNACK AND MAN-
UEL SILVA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 3, 1909.

DECIDED DECEMBER 6, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

EXCEPTIONS. BILL OF—*presentation.*

A bill of exceptions must be presented to the judge who presided at the trial. With certain exceptions not applicable in this case, presentation to another judge will not suffice.

Id.—*absence of judge.*

Mere absence of the presiding judge from the court house the judge being in the city and accessible, will not excuse failure to present to him a bill of exceptions.

OPINION OF THE COURT BY PERRY, J.

This was an action of ejectment. The trial was had before a jury, circuit judge Robinson presiding, and a verdict was rendered October 11, 1907. Plaintiff filed motions for judgment non obstante veredicto and for a new trial, both of which were denied in October, 1907. The time for presenting a bill of exceptions was duly extended "to the 9th day of December, 1908." No attempt was made by plaintiff to file or present the bill of exceptions prior to December 9, 1908. On the last named date he made search for Judge Robinson in his courtroom and at his chambers and, "to the best recollection and belief" of the affiant making an affidavit on the point, also at the judge's home but without success. He then handed the bill to a clerk of the circuit court for filing, at the same time informing the clerk that he was unable to find Judge Robinson. At the suggestion of the clerk presentation of the bill was then made to Judge De Bolt of the same circuit, the latter endorsing on the bill a memorandum of such fact, all of this occur-

Booth v. Schnack, 19 Haw. 659.

ring on the same date. The bill was not presented to Judge Robinson nor was his attention called to it prior to November 12, 1909, on which latter date he allowed the bill and endorsed on it a memorandum of such allowance. From an affidavit by Judge Robinson it appears that on December 9, 1908, "he was in Honolulu and was either at his chambers at the court house or at his residence during said day" and that "he was not inaccessible during said day by reason of absence from the city, illness or otherwise." The defendants now move to dismiss the bill on the ground that it was not presented to the judge or allowed or signed by him within the time prescribed by law or within the extended time.

In Sec. 1862 of the Revised Laws it is provided that "the presiding judge" may under certain circumstances reserve certain questions of law for the consideration of the supreme court; in Sec. 1863 that any question may be reserved in like manner upon motion on account of any opinion or ruling of "the judge" in any matter of law, and in Sec. 1864 that a party may allege exceptions to any such opinion or ruling and that these when reduced to writing and presented to "the judge" within a time stated and found conformable to the truth shall be allowed and signed by "the judge," but that if "the judge" shall refuse to allow them their truth may be otherwise established,—with the proviso that further time may be allowed by "the judge" in his discretion and that under certain circumstances the exceptions need not be written out or presented or allowed by "the judge" within the stated time but may be written out and allowed by "the judge" and filed with the clerk at any time, and that any such exceptions whether so written and allowed by "the judge" or so written whether allowed by "the judge" or not may within a certain other stated time or such further time as may be allowed by "the judge" "be incorporated in a bill of exceptions and presented to *the judge*. and being found conformable to the truth shall be allowed and signed by him." It seems to

Booth v. Schnack, 19 Haw. 659.

us to be too clear to require argument that the judge contemplated by the statute, to whom the presentation of a bill of exceptions is to be made, is the one who presided at the trial and not any of his associates; and likewise that the presentation must be to the judge himself and not to the clerk of the court or to any other official. We do not mean to be understood as holding that a delivery to the clerk may not under any circumstances suffice. It may be, for example, that if the appellant within the time provided by law calls the judge's attention to the fact that he has ready his bill of exceptions and if the judge thereupon directs manual delivery to the clerk, this would constitute a presentation to the judge within the meaning of the statute. As to that we express no opinion. The facts in the case at bar are wholly different. The judge's attention was not called to the preparation or filing or desired presentation of the bill and he was ignorant of these facts for nearly a year. The mere delivery to the clerk constituted under all of the circumstances of this case a mere filing in the court and not a presentation to the judge.

It may be, too, that cases may arise where the presentation to the presiding judge may be excused and where presentation to an associate judge or to his successor in office or a mere filing with the clerk may suffice to preserve the rights of the appellant. For example, Sec. 1654, R. L., provides that a successor or an associate may allow exceptions when the presiding judge "shall die or cease to be a judge by resignation, removal or otherwise or absent himself from the Territory or because disabled by reason of illness or other cause without having * * * allowed or signed" such exceptions, but the case at bar clearly does not fall within any of the exceptions named in this section.

Rule 15 of all the circuit courts of this Territory, promulgated May 1, 1893, if it is still in force and not in conflict with the statute, as to which we express no opinion, provides that "in case of his" (the judge's) "absence" bills of exceptions

Booth v. Schnack, 19 Haw. 659.

“may be filed with the clerk whose duty it shall be to present the same to the judge at the earliest opportunity.” This, however, is not a case of “absence” such as is contemplated by that rule. As held in *John Ii Estate v. Mele*, 14 Haw. 311, 312, “the rule was evidently intended to provide for cases in which the bill could not be presented to the judge on account of his inaccessibility as when absent from the city or possibly when confined at home by protracted illness.” The judge was in the city, not confined by illness, either at his home or at the courthouse and easily accessible. If “absence” were to be held to include “mere temporary absence from the courthouse as at the lunch hour” or at his home in the city “as well as absence from the city * * * the rule, which follows the statute in so far as it requires the bill to be ‘presented’ except in case of the judge’s absence, would practically permit the bill to be merely filed in any case, as, for instance, if the judge happened to be in the library or clerk’s office or in any other part of the courthouse than that in which he was sought.” *Ii Estate v. Mele*, supra. The present rule of the circuit court of the first circuit contains nothing to aid the appellant on this motion.

Counsel for the appellee expressly admitting that the extended time includes the 9th day of December, 1908, we have assumed this to be the fact.

The motion is granted and the bill is dismissed.

Magoon & Weaver for plaintiff.

A. G. M. Robertson for defendants.

Ching Tam Shee v. Oriental Life Ins. Co., 19 Haw. 663.

CHING TAM SHEE, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF C. WINAM, v. ORIENTAL
LIFE INSURANCE COMPANY, LTD., AND
CHARLES H. ROSE, DEPUTY SHERIFF.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 16, 1909.

DECIDED DECEMBER 7, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

INJUNCTION—*execution sale on judgment against a decedent—estoppel.*

A judgment creditor who had obtained allowance of his claim against the estate of a decedent may be equitably estopped thereby from causing the land of the decedent to be sold on execution.

OPINION OF THE COURT BY HARTWELL, C.J.

This was a bill for an injunction to restrain an execution sale of certain real estate which belonged to the testator C. Winam in his lifetime, the bill showing that the Oriental Insurance Co. obtained a judgment against Winam November 4, 1904, in the sum of \$2480.25; that he died testate March 3, 1908; that his will was admitted to probate and letters testamentary were granted to the plaintiff April 20, 1908; that notice to creditors was first published June 29, 1908, and November 5, 1908, before the expiration of the time for filing creditors' claims, the insurance company applied for a writ of scire facias in order to obtain execution on the judgment, and July 30, 1909, order was made for execution to issue and the writ was delivered to the defendant Rose, deputy sheriff, who, August 7, 1909, levied upon and offered for sale for satisfaction of the judgment all of the real property belonging in his lifetime to said C. Winam and by him devised by his last will to the plaintiff in trust for certain purposes set forth in the will.

The bill alleges that the estate of Winam is in process of settlement in due course under the supervision of the circuit

Ching Tam Shee v. Oriental Life Ins. Co., 19 Haw. 663.

court; that the insurance company filed its claim against the estate which had been allowed; that claims against the estate which had been allowed amounted to \$4718.58, for payment of which there was no personal property and that the real property does not equal in value the amount of the judgment; that the plaintiff contested the insurance company's right to a scire facias on the ground that the court was without jurisdiction to issue it and August 23, 1909, moved the court to quash the execution on the ground that the property was in custodia legis; that the insurance company had no judgment lien upon it and that as the estate was insolvent the effect of the execution would be to give to the company preferential payment of its claim to the exclusion of other creditors, but that the motion was denied. The bill submits that the issuing of the execution and the levy were without warrant of law for the same reasons which the plaintiff had presented in her contest against issuing the scire facias and for quashing the execution, and for the additional reason that by getting its claim allowed the insurance company was estopped from taking out execution and levying upon the property.

On the filing of the bill a temporary injunction was issued which on the defendants' motion was dissolved by decree of the court, the plaintiff appealing.

The defendants contend that the plaintiff's remedy was at law by bringing exceptions to the order granting the writ of scire facias and denying the motion to quash, which exceptions would have afforded her a full opportunity to review those rulings and that therefore equity will not grant the relief, citing *Atcherley v. Jarrett*, 19 Haw. 511.

The plaintiff seeks to distinguish that case by the fact of the insolvency of the estate, which could not have been known when the petition for scire facias was brought, as the six months for filing the claims had not then elapsed. But the insolvency must have been known to the plaintiff August 23, 1909, when

Ching Tam Shee v. Oriental Life Ins. Co., 19 Haw. 663.

the motion to quash was made, and if then available as a defense equity will not relieve the plaintiff from the consequences of her failure to make the defense unless there is something in the nature of the case which makes the rule in *Atcherley v. Jarrett*, and cases there cited, inapplicable.

Does the fact that there are claims of creditors not parties to the scire facias proceedings take the case out of the rule in the *Atcherley* case? The other creditors are undoubtedly entitled to have the decedent's property applied in payment of their claims pro rata and their right is enforceable in no other way than by a sale of the real estate by the executrix. The land of a decedent does not require to be inventoried as assets but it is equitable assets during the process of administration of the estate.

It does not appear that the administrator of an insolvent estate can place the estate in bankruptcy in order to prevent execution sales and a pro rata distribution among all the creditors by a creditor whose claim has been presented and allowed. If, as remarked in *Estate of Lopez*, ante p. 620, "There is no right of action against the administrator to recover a claim which he has allowed," it follows that a judgment creditor whose claim has been allowed has no right to an execution against the estate. The remark in the *Lopez Estate* case, although perhaps not required for the decision, correctly states the law, its reason being that after a claim is allowed by the administrator but not paid, although he may be liable personally for a devastavit or on his bond if he has wasted or misapplied the assets or failed to apportion them, as he ought to do, among the creditors pro rata, he is not liable to an action for its nonpayment. It is only upon the administrator's rejection of the claim that an action for its nonpayment lies against him and that must be brought within two months after notice of its rejection or after the claim becomes due. Any other course than this would place the estate at the mercy of

Ching Tam Shee v. Oriental Life Ins. Co., 19 Haw. 663.

judgment creditors having no liens by reason of their judgments and prevent its pro rata distribution. *Nathan v. Vida*, 1 Haw. 143.

The defendants' contention that it was the duty of the executrix if she wished to obtain exemption of the estate from suits to represent its insolvent condition appears to be based on statutes existing elsewhere but not here.

A judgment creditor cannot rely both upon his judgment and upon his allowed claim. By presenting his claim to the executrix and obtaining its allowance he was equitably estopped from proceeding to obtain satisfaction of his judgment against the estate. This is true whether he could have obtained execution against the estate if he had not got his claim allowed or not, a question upon which we express no opinion. The executrix would properly have inferred from the judgment creditor obtaining allowance of its claim against the estate that it did not intend to enforce payment by an execution sale of the land and did intend that the claim should take its regular course of administration with other claims. This assertion of claim precluded the judgment creditor from afterwards assuming an inconsistent position to the prejudice of the executrix. If it had intended to enforce satisfaction of judgment by execution sale it ought not to have obtained allowance of its claim against the estate generally thereby lulling the executrix into a sense of security that upon her application for its sale the land would be available in payment of all the allowed claims. It would be inequitable to allow him to do so and on this ground the injunction ought to be granted and is accordingly allowed.

Decree reversed. Injunction granted.

R. W. Breckons and *W. W. Thayer* for plaintiff.

Castle & Withington for defendants.

Nakookoo v. Noholoa, 19 Haw. 667.

SARAH NAKOOKOO AND AMY HELENE NAKOOKOO, OTHERWISE KNOWN AS AMY HELENE THOMPSON, MINORS, BY THEIR GUARDIAN JAMES A. THOMPSON v. DAVID NOHOLOA.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 26, 1909.

DECIDED DECEMBER 8, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

ESTOPPEL—*former judgment.*

An adjudication upon a petition for administration on the estate of a person dying testate concerning the correctness of a translation of the will and to the effect that it devised all property wherever situate is conclusive in an action to quiet title between the same parties relating to real estate left by the decedent.

OPINION OF THE COURT BY PERRY, J.

(Wilder, J., dissenting.)

This is an action at law to quiet the title to certain land situate in Honolulu, Oahu. The defendant filed an answer of general denial and with it a plea in bar setting up in substance the following: That in June, 1906, one Hikaalani Hobron Noholoa residing at Kalaupapa, Molokai, died testate seized in fee of the land in controversy; that the defendant was at that time her husband; that in the circuit court of the second circuit of this Territory, in probate, Hikaalani's will was upon the filing of a petition, the publication of notice and such other proceedings as are usually had in such cases admitted to probate on December 12, 1906; that at the hearing upon that petition the will, the original of which was in Hawaiian, was translated into English, a copy of the translation being attached to the plea, and that such translation was adopted by the court as correct; that subsequently in the same court a petition entitled "In the matter of the estate of Hikaalani Hobron Noholoa, de-

Nakookoo v. Noholoa, 19 Haw. 667.

ceased," was filed by one Kaimiola Nakookoo Gray for the appointment of an administrator of the estate of the decedent situate without Kalaupapa and alleging that petitioner was a niece and heir at law of Hikaalani, that the will devised to this defendant only such property as was situate at Kalaupapa, and that decedent left the land now in controversy and certain other real estate and also certain moneys outside of Kalaupapa and within this Territory; that at the hearing of the last mentioned petition defendant appeared and opposed it on the ground that all of the property belonging to the decedent was devised by her will; that at the hearing Kaimiola offered in evidence the record of the proof of the will already referred to including the translation filed at the first hearing; that the court made an order denying the petition for administration; that on appeal the supreme court of Hawaii affirmed that order on the ground that the will devised all the property of Hikaalani wherever situate to this defendant (18 Haw. 265); that Kaimiola appealed to the supreme court of the United States assigning as error the action of the supreme court of Hawaii in deciding the case upon the translation referred to and its ruling in construing the will, that by the latter the decedent left to this defendant all of her property wheresoever situate and whether within or without Kalaupapa; that on such appeal the supreme court of the United States sustained the decree of the supreme court of Hawaii (214 U. S. 108, 113); that subsequently but prior to the institution of this action Kaimiola died; that Hikaalani left surviving her as heirs at law this defendant and Kaimiola the daughter of one Nakookoo the brother of Hikaalani and no others; that the present plaintiffs are nieces of Kaimiola and grand nieces only of Hikaalani and that their only claim to the land in question is as heirs at law of Kaimiola.

To this plea plaintiffs filed a replication denying that at the hearing of the petition for the probate of the will the trans-

Nakookoo v. Noholoa, 19 Haw. 667.

lation above mentioned was adopted by the court as correct, denying the correctness of the statement as to the relationship of the plaintiffs to Hikaalani and admitting the truth of all the other allegations of fact contained in the plea.

The court below sustained the plea in bar and upon the pleadings entered judgment for the defendant. Plaintiffs bring a writ of error.

In this court the plaintiffs abandoned their contention that they are entitled to the land as heirs of Hikaalani and rely solely upon the claim of title derived through Kaimiola as her heirs. Plaintiffs, therefore, are the privies of Kaimiola. If the latter if living would have been bound in this case by the former proceedings the plaintiffs are now bound. Was Kaimiola concluded? We think she was.

Whatever conflict, real or apparent, there may be in the statements elsewhere of the principles in the law of *res judicata* or in the manner of the application of those principles to the circumstances of particular cases, as much of the law as is involved in the case at bar is settled in this jurisdiction. "A final decision fixes certain rights and in a contest as to such rights it is incumbent upon parties to put in their whole case. If they do not, it is their fault and they cannot afterwards be permitted to set up what they previously omitted. Consequently so far as the subject matter or ultimate thing adjudged is concerned it is conclusively presumed that every intermediate point that might have been raised was settled whether it was raised or not. But as to a different subject, only such points as were actually raised and decided in respect of the first subject are regarded as settled. For although the subject is different, still the parties have actually had their contest over the intermediate point and should not be permitted to have a second contest; but intermediate matters not litigated or decided in the first proceeding are not regarded as settled as to a different subject, for not only have they not been decided in fact but

Nakookoo v. Noholca, 19 Haw. 667.

there was no duty to litigate them in the first case except so far as that case was concerned. A party may waive his right to litigate a matter as to one thing without waiving his right to litigate it as to another thing, for he may waive his right to the thing itself without waiving his right to another thing. * * * Of course, these propositions are stated subject to other established principles, such as that the parties must be the same, the matter must be directly in issue and the court must be one of complete jurisdiction. We may add also that another proposition relied on in argument, namely, that there is no estoppel as to matters that may be merely inferred from a judgment, applies only to inferences that are possible or probable and not to those that are necessary." *Hawaiian Commercial Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50, 54, 55.

Passing for the moment the question of jurisdiction, it is apparent that within these principles the plaintiffs are bound. The parties in the two proceedings, that is, the petition for administration and the present action, are the same. While circuit judges sitting in probate have jurisdiction under our statute to sell the land of the decedents when necessary to pay debts it may be assumed for the purposes of this case that the first proceeding was solely for the appointment of an administrator of the personal property and that this action relates to a different subject matter, the title to the land. The ultimate matter adjudged in the first case, the right to administration regardless of the will, is not involved in this, but two points which do arise in the case at bar and which are essential to the plaintiff's case did arise and were adjudicated in the first. Those points are the correctness of the translation of the will and the construction of that will. The plaintiff's predecessor, Kaimiola, not only was a party to the first proceeding but actually litigated these two intermediate points. She herself offered in evidence, with the record of the probate of the will, the translation which was adopted as correct by the circuit judge in

Nakookoo v. Noholoa, 19 Haw. 667.

probate and by the two appellate courts in succession. Direct issue likewise was raised as to the proper construction of the will as thus translated. In order to obtain administration it was essential for the plaintiffs to show that the personalty in Honolulu was not devised by the will. The defendant took the position that the will did devise it. The court might have decided this issue by assuming that the word "waiwai" as used in the will meant personal property and by holding that the expression "a me na waiwai e ae apau i ike ia no'u," "and all the other property known to be mine," referred to all personal property wheresoever situate. What it did do, however, was to determine, as it properly could under the pleadings, and as it naturally would, what the word "waiwai" in fact meant in the connection in which it was used and then to construe the expression here quoted, and it held that waiwai meant "property" generally and not "personal property" specifically and that the expression referred to all other property wherever situate and not merely to all other property at Kalaupapa. This was an intermediate point properly determined within the pleadings in order to determine the ultimate matter of the right to administration. In this proceeding then for a different purpose that adjudication, although on an intermediate point in the former case, is binding. "If the relationship or heirship is not the direct subject, but it is merely one of the grounds upon which the final judgment disposing of the direct subject is based, as, for instance, if the direct purpose is the appointment of an administrator, and if in order to decide this matter the question of who is next of kin to the deceased is actually litigated and adjudicated, the adjudication will be conclusive upon all who were parties to that proceeding, even in a different proceeding for a different purpose, as, for instance, in a proceeding for distribution." *Mossman v. Hawaiian Government*, 10 Haw. 421, 427. See also pp. 424, 425; and *Burns v. Afong*, 19 Haw. 486.

Nakookoo v. Noholoa, 19 Haw. 667.

In the discussions of the principle of *res judicata* reference is constantly made to the former adjudication as being one by a court of competent jurisdiction, but whether by that is meant that the court must be one competent to make the adjudication which it did make or one competent to adjudicate the ultimate question arising in the second case is not always clear. It may be that the cases are not in accord on that point. However that may be, upon this point also the law, as far as applicable to the case at bar, has been settled in this jurisdiction. In *Keahi v. Bishop*, 3 Haw. 546, an adjudication of a question of pedigree in a probate court in a proceeding for distribution of the personal property of a decedent was set up as a bar to the litigation of the same question of relationship in an action of ejectment. The former proceedings were held to constitute a bar. The court said *inter alia*, "the court has merely determined that Kapepa is half brother without reference to the title in any real estate, and, if by reason of this decision, he is entitled by law to any real estate, he is entitled to use that decision for the purpose of getting possession of it or in defending himself in the possession of it." In a subsequent proceeding "Kapepa could not be made to prove over again his relationship. The judgment which he has always had is conclusive evidence of that, and this court cannot allow the validity of its own judgment, arrived at after an immense amount of testimony has been offered and great care has been bestowed in the consideration of the case, to be questioned. * * * Kapepa's pedigree was settled by a judgment of a court of competent jurisdiction. * * * It has been so tried and determined and cannot be tried again, and inasmuch as the plaintiffs only allege that they are cousins, the judgment that Kapepa was half brother is a complete bar in the right to recover by the present action." Pages 552, 553, 554. One of the justices dissented upon the very point whether the court of probate had jurisdiction to make a finding in that proceeding

Nakookoo v. Noholoa, 19 Haw. 667.

which would be binding at law in an action of ejectment concerning a different subject matter, and Van Fleet agrees with the dissenting justice. 1 Former Adj., pp. 74-76. We need not consider the point as though it now arose for the first time. That decision was rendered in 1874 and as far as this particular question of jurisdiction is concerned it has not been departed from in any of the later cases. It has become a rule of property and ought not now to be departed from. Many titles have doubtless passed on the strength of the ruling there made that such intermediate adjudications of heirship in probate in a proceeding for distribution are binding at law in ejectment. No difference in principle exists between an intermediate question of heirship and an intermediate question of the translation of a will or of its construction. If each was involved in the first proceeding and was actually litigated the determination of it will be binding upon the same parties in the subsequent proceeding.

It was impossible for the court in the proceeding set up as a bar in this case to determine the question of the petitioner's right to administration on the ground upon which it was claimed and in view of the sole ground of opposition by the present respondent without construing the will. In determining whether that petition should be granted the court had jurisdiction to construe the will and that jurisdiction included the power to hold that the will devised *all the property* of whatever nature as clearly as it did the power to hold that the will devised *all the personal property*. In the *Keahi* case it could as well have been urged, and it was urged, that the probate court was without jurisdiction to determine who were the heirs of the *real estate*; but it admittedly had jurisdiction to adjudicate who were the distributees (the same persons under our statute who were the heirs) of the personal property and having so adjudicated the adjudication was held conclusive as to the real estate as well. It was on this very point that the

Nakookoo v. Noholca, 19 Haw. 667.

members of the court were unable to agree. All the objections and arguments now urged concerning lack of jurisdiction to try the title to real estate were advanced and considered in that case.

As already stated, *Keahi v. Bishop* has not been overruled upon this point. In *Kauhi v. Liaikulani*, 3 Haw. 356, the prior grant of administration did not involve a determination of heirship; nor did the appointment of guardians. The court simply held in the later proceeding that there had been no adjudication in the earlier.

In *Kailianu v. Lumai*, 8 Haw. 508, the adjudication claimed as a bar was a decree that the property which consisted solely of land should be equally divided between five persons named as being the issue and heirs of the decedent. The decree was made upon a petition for letters of administration. The court, "passing by the question as to whether the probate court had authority at all to entertain a petition for administration on an estate consisting solely of real estate of an intestate who had died seventeen years before, when all claims to be settled by the administrator would have been barred by the statute of limitations" held that "the judgment rendered by the circuit judge was not responsive to the petition" and that such a judgment could not be rendered "on a petition for letters of administration," referring to that course as a usurpation of jurisdiction. That was a state of facts not at all analogous to that in the case at bar. The *Kailianu* case, the court said in that opinion, "differs radically from *Keahi v. Bishop*." The distinction was pointed out in the following language: "There the administrator had been appointed, had settled the debts and brought money into court to be distributed to the heirs of the intestate. The probate court was held to have authority to ascertain who the distributees were, and, having the various claimants before it and hearing the evidence of their relationship, made a decree as to who were entitled to the fund by virtue of their

Nakookoo v. Noholoa, 19 Haw. 667.

relationship to the intestate. This decree adjudicating the descent or pedigree was held to be 'binding not only in the proceedings in which they took place but in every other in which the same question is agitated'—but it is only binding when the decree is a competent one, that is, made by a court having jurisdiction." While reiterating this general principle, there is no indication in the entire opinion of disapproval of *Keahi v. Bishop*.

Henry Smith v. Hamakua Mill Co., 13 Haw. 245, likewise does not hold to the contrary. It was there held that the probate judge did not have jurisdiction in 1871 to declare the heirs of a decedent in a direct proceeding instituted for that purpose as distinguished from a proceeding for the distribution of property or to decree a distribution of the real estate,—neither of which statements is in conflict with *Keahi v. Bishop*. On the only other question determined, a former adjudication of a question of heirship or relationship in a proceeding in probate for the distribution of personal property was held not binding in a subsequent action of ejectment with respect to real property *as to one who did not appear as a party or claimant* in the probate proceedings. In other words, the sole ground of the decision upon this latter point was that Kapehe, the party against whom the estoppel was urged, was not a party to the first proceeding. This also is in accord with the actual decision in *Keahi v. Bishop*.

Proper v. Proper, 14 Haw. 596, was a libel for divorce in which the main question was as to the construction of certain statutes relating to service by publication. The remark that "in former years circuit judges not infrequently distributed estates on petitions and notices for appointment of administrators, and distributed real estate as well as personal property on final distribution, but this court has not upheld the exercise of such jurisdiction," citing the *Kailiannu* and *Hamakua Mill*

Nakookoo v. Noholoa, 19 Haw. 667.

cases, adds no light not furnished by an examination of those cases.

The judgment is affirmed.

A. G. M. Robertson for plaintiffs.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for defendant.

DISSENTING OPINION OF WILDER, J.

I dissent from the majority on the ground that on the petition for letters of administration the circuit judge sitting in probate and on appeal this court and the United States supreme court had no jurisdiction to construe the will to the effect that the ancestor of the plaintiffs had no title to the land in question, that is, that it was devised by the will to defendant Noholoa. That there was jurisdiction to construe the will so far as to ascertain whether the decedent died intestate as to any personal property requiring administration is conceded of course. The opinion of the majority proceeds upon the theory that if a court in determining an ultimate point of which it undoubtedly had jurisdiction adjudicated an intermediate point the adjudication of that intermediate point is a bar in subsequent proceedings between the same parties or privies although as to a different subject matter. That proposition has been approved by this court in *Hawaiian Commercial Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50. But it must be remembered that the court or judge adjudicating the intermediate point must have jurisdiction to decide that point, otherwise it is no more a bar than if it or he had no jurisdiction to determine the ultimate point. The ultimate point here was whether the petition for administration should be granted or denied. The intermediate point determined was the construction of the will that it devised all the land of the testatrix wherever situate, in effect determining that defendant and not plaintiffs' ancestor was entitled to the land involved in this action.

Nakookoo v. Noholca, 19 Haw. 667.

The general principles which are applicable are well stated in *Kauhi v. Liaikulani*, 3 Haw. 356, 357, where the court speaking through the present chief justice, said: "A decree of a court of competent jurisdiction. is generally conclusive in matters which (are) required to be adjudicated as a basis for the decree. In granting administration, the intestacy of the decedent requires to be determined and that fact when so determined should not afterwards be questioned by parties to the proceedings. But if the court should go on to decide other matters not then requiring adjudication, as for instance who the heirs are, such adjudication would have no conclusive effect. In appointing a guardian, the court has only to find prima facie cause for such appointment. But that in any ex parte or preliminary proceedings in probate there is a final adjudication of heirship, kindred or legitimacy of birth or marriage, is more than can be admitted. Such questions are always open on hearings for final distribution. There is then no formal adjudication which is conclusive on the status of the appellee." In that case in speaking of intestacy the court undoubtedly had reference to intestacy as to personal property and not as to land.

In *Kailianu v. Lumai*, 8 Haw. 508, which was an action of ejectment in which plaintiffs claimed to be the great granddaughters of the patentee, the trial court directed the jury to find for the defendants on the ground that on a petition for administration of the estate of the patentee the pedigree had been decided by the judge in probate adversely to plaintiffs' claim in that he found that the intestate's land should be equally divided between certain persons whom he decided to be the heirs. This court said (p. 510): "This could not be done on a petition for letters of administration. It was a usurpation of jurisdiction that was common enough in the probate courts of fifteen or twenty years ago. Undoubtedly such findings were generally in accord with the real facts, and for that rea-

Nakookoo v. Noholoa, 19 Haw. 667.

son have been very generally acquiesced in. But neither by statute nor by precedents does such an authority exist. If the petition before the court was for the appointment of an administrator all that was coram judice was either the appointment of one or the refusal to appoint one. We hold that the court had no authority, upon the petition for letters, to order the real estate partitioned among the heirs." The court then goes on to distinguish that case from *Keahi v. Bishop*, 3 Haw. 546, relied on by the majority in the present case. It points out that there the administrator had been appointed, had settled the debts and brought money into court to be distributed to the heirs of the intestate. As stated the probate court had authority to ascertain who the distributees were and having ascertained that it was held binding in other proceedings between the same parties as to land, but as the court in the *Kailianu* case very well said (p. 511): "It is only binding when the decree is a competent one, that is, made by a court having jurisdiction." It should be remembered too that the writer of the opinion (Chief Justice Judd) was the one who dissented in the *Keahi* case, although subsequently he had repeatedly joined in decisions affirming the rule announced by the majority in that case.

In *Proper v. Proper*, 14 Haw. 596, 600, this court said: "In former years circuit judges not infrequently distributed estates on petitions and notices for appointment of administrators, and distributed real estate as well as personal estate on final distribution, but this court has not upheld the exercise of such jurisdiction."

In *Smith v. Hamakua Mill Co.*, 13 Haw. 245, it was held that the probate court did not have jurisdiction in 1871 to declare the heirs of a decedent in a proceeding instituted for that purpose as distinguished from a proceeding for the distribution of property, nor did it have jurisdiction to decree a distribution of real property.

Nakookoo v. Noholoa, 19 Haw. 667.

In the *Keahi* case the ultimate point to be determined was who were the persons entitled to the money, and the intermediate point necessary to be adjudicated was their relationship to the decedent. Undoubtedly there was jurisdiction to determine both points. In this case the ultimate point was whether the petition for administration should be granted or denied. The intermediate point adjudicated was that the decedent had devised and bequeathed all of her personal *as well as her real* property to defendant. Whatever was decided as to the real property was not only unnecessary to dispose of the ultimate point, the right to administration, but was beyond the jurisdiction of the court in that proceeding to do. In my opinion the decision in the *Keahi* case does not control the one at bar.

It is with particular regret that I feel compelled to differ from the majority, in view of the fact that it was only on account of the land involved (there not being \$5000 worth of personal property) that allowed this matter to be appealed to the United States supreme court. However, if this court made a mistake in deciding a matter concerning which it had no jurisdiction and allowed the United States supreme court to fall into the same error, now is the time to point it out and rectify the mistake as far as possible.

No. 10. SARAH NAKOOKOO AND AMY HELENE NAKOOKOO, OTHERWISE KNOWN AS AMY HELENE THOMPSON, BY THEIR GUARDIAN, JAMES A. THOMPSON, v. DAVID NOHOLOA. Error to Circuit Court, First Circuit. Petition for Rehearing filed December 11, 1909. Decided December 14, 1909. Hartwell, C. J., Wilder and Perry, JJ. Per curiam: The plaintiffs' petition for rehearing is denied without argument under the rule. The law of *res judicata* applies to decrees of appellate courts, although of affirmance only. See the following cases, which were

Nakookoo v. Noholoa, 19 Haw. 679.

considered in this case: *Mitchell v. Mitchell*, 6 Md. 224; *Chouteau v. Gibson*, 76 Mo. 38; *Crane v. Blum*, 56 Tex. 325; *Sturgis v. Rogers*, 26 Ind. 1; *Goodsell v. Telegraph Co.*, 55 N. Y. Sup'r Court 173; 24 A. & E. Ency. 722, 812; 13 A. & E. Ency. 43, 44. The plea and the replication show that each of the appellate courts entered a decree and that in each instance the specific point adjudged was that relating to the construction of the will. That the opinion upon which a decree is based may be examined to ascertain the precise question determined, see *Rawlins v. Honolulu Soap Works*, 9 Haw. 496, and *Burns v. Afong*, 19 Haw. 486. It appears to be clear to the majority of the court that the denial of the petition for administration, which petition was based solely on the ground that there was property not disposed of by the will and contested solely on the ground that there was no such property, was based on no other ground than that by the construction which the court placed on the will there was no property subject to administration. The questions decided were, within the meaning of the rule, directly and not collaterally in issue. All of the points referred to in the petition and argument for rehearing were considered at the former hearing.

A. G. M. Robertson for plaintiffs.

Holmes, Stanley & Olson for defendant.

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

KAANAPU SYLVA AND HANNAH JACKSON *v.* WAILUKU SUGAR CO.

PETITION FOR REHEARING.

ARGUED DECEMBER 7, 1909.

DECIDED DECEMBER 15, 1909.

HARTWELL, C.J., WILDER AND PERRY, JJ.

LIMITATIONS, STATUTE OF—*action to recover possession of land—entry.*

The term "entry" used in the statute refers to the common law extrajudicial remedy of one who is ousted from his freehold, whereby to regain possession.

OPINION OF THE COURT BY HARTWELL, C.J.

(Perry, J., dissenting.)

The defendant having filed a petition for rehearing of the case reargument was requested "upon the meaning and effect of Instruction 18, in view of other instructions relating to the same subject and of the ruling in *Kapiolani Est. v. Thurston*, 17 Haw. 324, 325; *Motes v. U. S.*, 178 U. S. 320 (458), and *Fid. Mut. Life Assn. v. Mettler*, 185 U. S. 320."

The instruction was as follows:

"No. 18. If you find from the evidence in the case that the defendant entered upon the lands in dispute as shown by the evidence or any portion of them under claim of title, or deed, that such entry was, in law, wrongful unless such entry was made within the period of ten years from the date the title or right to such land was first vested in the party making such entry, the defendant, and within ten years from the time the right to such land accrued to the predecessor or predecessors, if any, under whom such right is claimed by the defendant."

The defendant's attorney argued that there is an essential difference between harmless error in rulings upon evidence, as in cases above cited, and erroneous instructions which cannot be regarded as offset or cured by correct instructions, citing *Territory v. Richardson*, 17 Haw. 231, 236, in which case instructions

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

applicable in an action for money had and received were held not to be cured by instructions appropriate to the case, which was the trial of an indictment for embezzlement. It may be that the opinion of the majority of the court in the present case states the rule about conflicting instructions in broader language than can be reconciled with the ruling in *Territory v. Richardson*. But this does not dispense with the necessity of considering whether the instruction 18, above cited, may not be correct. If the term "entry" is taken in its popular meaning of going upon one's land, an instruction that one's entry upon his land, when not dispossessed, more than ten years after he acquired it, is wrongful, would be not only preposterous, but, as stated in the dissenting opinion, equivalent to an instruction to find in this case for the plaintiffs; but if instruction 18 may properly be taken to mean that defendant's entry would be wrongful, made for the first time ten years or more after the right to make it first accrued, and if this would be a correct statement of the law, there would be no occasion to consider the effect of other instructions.

But at common law entry was the extrajudicial remedy for the wrong done by ousting the owner of the freehold, whether by abatement, intrusion or disseizin and applies only in cases "when another person who hath no right hath previously taken possession of lands or tenements." 3 Blackstone's Com., 168, 174. If the ouster is effected by discontinuance or forfeiture "the owner of the estate cannot enter but is driven to his action." *Ib.* 175. The remedy by entry, however, must be pursued "in a peaceable and easy manner and not with force or strong hand." *Ib.* 179. If this could not be done the remedy to obtain possession was by writ of entry. Our statute of limitations, ch. 127 R. L., part 2, entitled "Real Actions," was taken mainly from the Massachusetts statute, ch. 196 Pub. Stat., which is based upon the statute 3 & 4 Will. IV. c. 27. This is evident by comparing the English statute, found in the

Sylva v. Walluku Sugar Co., 19 Haw. 681.

appendix of Angell on Limitations, 6 ed., with the Massachusetts and Hawaiian enactments. It is evident that the term "entry" is used in our own statute as well as in the others mentioned in its common law meaning.

Sec. 1988 R. L., then, in requiring that no person shall make an entry upon any land unless within ten years after the right to bring an action to recover possession of it first accrued, means that the entry must be made within the time named and not after and implies that the person entitled to possession was ousted by the disseizor or otherwise, for if in possession he would have no occasion to "recover" it. By Sec. 1990 R. L. "In the construction of this chapter the right to make an entry or commence an action shall be deemed to have first accrued at the times respectively hereinafter mentioned," including the time "when any person shall be disseized," and "in the cases not otherwise specially provided for, the right" (to make an entry or commence an action) "shall be deemed to have accrued when the claimant or the person under whom he claims has become entitled to the possession of the premises under the title upon which the entry or action is founded."

The instruction, therefore, means in substance and legal effect that the first entry by a dispossessed owner of land must be made within ten years after he was ousted when his right accrued to bring an action to recover its possession.

If it be said that the jury would have taken the popular meaning of "entry upon land" and that the legal meaning ought to have been defined by the court the answer is that failure to do this, when not requested by the defendant, is not error.

In the expression in the instruction "within the period of ten years from the date the title or right to such land was first vested," the word "or" may be regarded not as an alternative but as equivalent to "meaning." A right to land does not necessarily imply ownership. It "is generally treated as the right to property not in possession, as distinguished from *jus in re*, which

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

implies the absolute dominion." 2 Bouvier's Law Dict. 73. "And this, indeed, is the accurate expression for every case of that species of *jus in personam* which is styled *jus ad rem*. In every case of the kind, the party entitled has *jus in personam ad jus in rem acquirendam*. That is to say, he has a right, availing against a determinate person, to the acquisition of a right availing against the world at large. And, by consequence, his right is a right to an act of conveyance or transfer on the part of the person obliged." 2 Austin, Jur. 42.

No other meaning than that which is above outlined can properly be given to the instruction in accordance with the statute upon which it is based and it does not appear that any other was placed upon it at the trial. If the plaintiffs' attorney had thought that the jury could suppose it meant that the defendant could not lawfully have gone upon its own land while in possession of another, unless within ten years after it acquired it, he would not have failed to urge this view upon them, in which case, if it can be supposed, he would promptly have been checked by the court. On the other hand, if the defendant's attorney had supposed this to be a possible meaning of the instruction he would wisely have rested the case upon an exception to it. It is difficult to believe that any jury would draw this meaning from the instruction or that the court intended that they should find that one could not rightfully go on his own land, while held by another, ten years after he got it. It is to be regretted that juries are instructed on the law so elaborately that even the appellate court may find it difficult to understand the instructions. But to set aside a verdict because the instruction is susceptible of a meaning not intended by the trial court and not adopted at the trial by counsel on either side would not tend to promote the administration of justice.

Few verdicts could stand if the law essays often read to the jury as instructions were required to be so worded that the jury would understand their legal meaning.

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

Upon consideration of the argument made upon the partial rehearing which was granted we see no reason to modify our former opinion, argument upon the petition for rehearing the rest of the case being denied under the rule.

S. M. Ballou for the petitioner.

R. P. Quarles contra.

CONCURRING OPINION OF WILDER, J.

While agreeing with the reasoning of the opinion of the chief justice, I concur in its conclusion on the additional ground that the evidence requires a finding that plaintiffs are the owners of the land in dispute by adverse possession. The testimony on behalf of plaintiffs showed that in 1875, after Cornwell deeded to Kaauwai and built the Cornwell fence, the grantee actually lived on the land in dispute in the same house that the original awardee lived in, it not appearing for how long, that the land mauka of the Cornwell fence was substantially fenced in, that Kaauwai cultivated the land in dispute, that plaintiffs and their predecessors after Kaauwai always lived in this substantial enclosure, although not on the land in dispute, that off and on from the building of the Cornwell fence plaintiffs and their predecessors cultivated the land in dispute, that plaintiffs always paid the taxes on the land, that Cornwell Jr., one of the defendant's predecessors, endeavored to buy out the interest of one of the plaintiffs, that plaintiffs and their predecessors always claimed title to the land, that defendant in 1898 leased for ten years the interest of one of the plaintiffs and paid its lessor's taxes thereon, that some of the members of plaintiffs' families were buried on the land in dispute, and that from 1875 to 1908 neither the defendant nor any of its predecessors ever claimed the land or went on it under a claim of title. On behalf of defendant the testimony tended to show that after Kaauwai's death, which occurred in 1884, plaintiffs and their predecessors never cultivated the land in dispute, and that after the death of Kaauwai it was vacant and unoccupied.

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

The most that can be said of defendant's evidence is that it constituted a mere scintilla, which under the ruling in *Smith v. Hamakua Mill Co.*, 14 Haw. 669, is insufficient to support a verdict.

DISSENTING OPINION OF PERRY, J.

Even in the light of the common law discussion contained in the above opinion I am unable to construe the instruction as it is there construed.

Unless words and phrases capable of both a technical and an ordinary signification are specially defined by a judge who is instructing a jury as to the law of the case, the language used by the judge will be given by the jury its ordinary every day meaning, the only meaning which it is familiar with. All of the jurors who sat in this case were, it may be safely said, wholly ignorant of the history of writs of right and writs of entry and of any technical meaning at the common law of the word "entry" and of the words "title to land" and "right to land." Listening to the statement of the law contained in the instruction, in all probability for the first time in their lives, they would, I believe, naturally understand it then, as I understand it now, to be a direction that the defendant's going upon the land was wrongful if it took place within ten years from the time when the defendant or its predecessors acquired title to the land. In the instruction itself the judge showed in the use of the words "as shown by the evidence" that the entry he was talking about was the act of going upon the land which the evidence adduced tended to show had been done by the defendant. This also appears from plaintiffs' requested instructions 4, 7, 11, 13, 14 and defendant's No. 9, and perhaps in others, where the words "entry," "enter," "go upon," "acts of trespass" and "obtain possession" are all used as importing a going upon the land and as referring to acts of the class which the evidence tended to show had been committed by the defendant

Sylva v. Walluku Sugar Co., 19 Haw. 681.

upon the land in controversy. Likewise the construction that the words "from the date the title or right to such land was first vested" in the defendant or its predecessors meant from the date when the right to judicially recover land not in the possession of the defendant or its predecessors first accrued, or from the date when defendant was ousted, could not reasonably have occurred to men ignorant of the common law. I venture the surmise that even if the jury had been composed wholly of lawyers chosen by lot from all the attorneys of this Territory or of this city, the jurors would have taken the language of the instruction in its ordinary acceptation, and, while holding a different view as to the law, would have regarded it as a direction to find for the plaintiff if they found the facts of possession at the time by the plaintiff, a going upon the land by the defendant in spite of such possession and a lapse from the date of the deed to the defendant or its predecessors to the time of such entry of a period of more than ten years.

On the petition for rehearing plaintiffs' attorney argued in this court, in support of the instruction, that it is the law that a person who has acquired title by deed may not lawfully enter upon the land if it is at the time in the possession of another who has had possession for however short a period, less than ten years, and who has no other claim of title, unless he, the grantee, does so within ten years from the date of his deed, adding that thereafter the title would remain in the grantee but that the latter would have no remedy to obtain possession or to otherwise render his title effective. It is fair to infer that argument of the same nature was presented in the trial court in support of the requested instruction and that the latter was granted as meaning what in my first dissenting opinion and in this opinion it is construed to mean and that fact alone would amply excuse a failure on defendant's part to ask, even if otherwise it would have been its duty to do so, for other instructions defining the terms used. If the trial judge had not concurred

Sylva v. Wailuku Sugar Co., 19 Haw. 681.

in counsel's view of the law on the point he would have expressed the instruction in other language. Defendant's attorney, the record shows, excepted to the giving of the instruction. The inference is that he opposed its granting.

If instructions are so ambiguous, confusing or misleading that even the appellate court finds it difficult to understand them, it cannot be said with any certainty that the jury understood them, that the trial judge performed his duty or that both parties have had a fair trial.

While concurring in the view that the evidence was sufficient to support a finding of adverse possession by the plaintiffs and their predecessors in interest of the land in dispute, I am of the opinion that the evidence was not such as to necessarily require that finding and that there was sufficient evidence to support a finding against the plaintiffs on that issue. Aside from the fact that there was evidence tending to show intimidation on behalf of the plaintiffs of one at least of the defendant's witnesses and other evidence tending to weaken the credibility of some of plaintiffs' witnesses who testified on the subject of adverse possession, there was evidence, *inter alia*, that the land in dispute and the portion upon which plaintiffs' house now stands were not fenced in as one lot and that the only fences standing for any considerable period of time were the Cornwell fence on the makai side and a stone wall along the road; that the parcel in dispute has not been cultivated or used in any other manner since Kaauwai's death, which occurred according to the evidence in 1882, 1883 or 1884, but has been covered with lantana and other noxious weeds since that time; that horses and cattle belonging to others pastured on the lot without restraint until the time of plaintiff Hannah's marriage about four years prior to the trial when her husband repaired the fences; that before defendant's entry the occupants of the adjoining Kaina kuleana planted taro and peanuts on the land in question; and that the holding by the plaintiffs and their predecessors was not continuous for the full period of ten years at any time prior to defendant's entry.

INDEX.

ACCOUNT.

1. *Concurrent jurisdiction of law and equity.*

An action of assumpsit having been brought at law, it is not a ground for nonsuit that it is founded on a long and complicated account. *Kaleikini v. Waterhouse*, 359.

2. *Verified statement in suit on open account.*

Act 52, S. L. 1905, relating to verification of open accounts upon which suit are brought, and providing for counter affidavit of defendant, does not apply to a suit upon an account stated. *Estate of Holmes v. Fujitani*, 574.

ADVERSE POSSESSION.

1. *Land under lease—surrender.*

Land was leased in 1891 for fifteen years, the lessees going into possession. Since 1892 the land has been in adverse possession of a third party. In 1897 a second lease was made for twenty years to different lessees to begin during that year. It is held that the statute of limitations started to run against the landlord at least in 1897 on the theory that the first lease was surrendered. *In re Castle*, 484.

APPEAL AND ERROR.

1. *Petition for rehearing denied.*

A petition for rehearing which discloses no substantial ground under the rule for modifying the original decision, will be denied. *In re Lewers & Cooke*, 47.

2. *On point of law.*

An appeal on point of law that demurrer was erroneously sustained, sustained if any one ground of the demurrer was well taken. *Colburn v. Holt*, 65.

3. *Jurisdiction—amount in controversy.*

Petition for allowance of appeal in a tax case from this court to the United States Supreme Court is denied, it appearing that the amount of tax in dispute is the sum of \$1706.09; in such case, it is not the amount of the entire tax, but the amount in controversy which, under Act of Congress of March 3, 1905, amending Sec. 86 Organic Act, fixes the jurisdiction on appeal. *In re Taxes Ewa Plantation Co.*, 72.

APPEAL AND ERROR—Continued.

4. *Diminution of record—practice.*

On motion made to eliminate part of a record, and to add thereto certain documents referred to during the trial in the lower court, the record and motion may be sent to the trial court with directions to make the record conform to the true state of facts and return to the appellate court. *Ferreira v. Kamo*, 162.

5. *Amending record from district court.*

An appellate court has no power to amend the record of a trial court by original action. A party impugning the verity of a record should make application to the court in which the error is alleged to have occurred. *Ferreira v. Kamo*, 187.

6. *Question not stated in certificate of appeal.*

On appeal from a district court on question of law, a point of law not stated in the certificate of appeal cannot be considered. *Territory v. Schaefer*, 214.

7. *Findings in jury waived case.*

The findings of fact of a circuit court in a jury waived case cannot be reversed on exceptions where there is evidence on both sides and the issue turns upon the credibility of the witnesses. *McCandless v. Honolulu Plantation*, 239.

8. *General exception.*

A general exception to the decision of a court, jury waived, finding for the plaintiff, does not bring to the consideration of this court a possible defense disclosed by the evidence but not called to the attention of the trial court. *McCandless v. Honolulu Plantation*, 239.

9. *Interlocutory order in law case.*

An interlocutory appeal will not lie from an order refusing a continuance in a law case, the remedy being by exceptions. *Waldeyer v. Wailuku Sugar Co.*, 244.

10. *Notice on appeal from interlocutory order.*

An appeal allowed from an order overruling a demurrer must be taken by filing notice of it within five days after the order. *Middleditch v. Cathcart*, 299.

11. *Amendment of record by district magistrate.*

A motion to amend the record of a district magistrate, accompanied by an offer to prove the record erroneous or incomplete in material particulars, should be heard and decided by the magistrate upon the evidence offered and any counter evidence that may be produced. *Ferreira v. Kamo*, 317.

12. *Second appeal.*

The appeal of one party having been sustained and a new decree entered by the trial court, a motion to dismiss an appeal from the new decree is denied, it appearing that new points of law,

APPEAL AND ERROR—Continued.

although not raised by counsel, exist to the extent of requiring a modification of the decree. *In re Lewers & Cooke, Ltd.*, 334.

13. *Findings of fact by trial judge.*

It is within the power of the trial judges to make findings of fact, and such findings will not be stricken from the record on motion. *In re Lewers & Cooke, Ltd.*, 334.

14. *Decision of court, jury waived.*

The decision of the judge of a circuit court, jury waived, being based upon the existence of an implied promise, this court, upon finding error, will not consider whether the testimony would have sustained a finding of an express promise, but will order a new trial. *Dillingham v. Scott*, 421.

15. *Finding in jury waived case.*

There was evidence in this case to sustain the judge's finding, jury being waived, of an express agreement for payment of a stated sum. *Carpenter v. Lawson*, 433.

16. *Decision of land court not appealable.*

An appeal to this court does not lie from a decision of the court of land registration. *In re Castle*, 436.

17. *Dismissing for delay in filing transcript.*

Appeal dismissed on motion under Rule 1, on account of delay in procuring and filing transcript. *Mia v. Kekipi*, 471.

18. *Appeals in insanity cases.*

Since the enactment of Act 149 of the laws of 1909 no appeal lies to a circuit court from the decision of a district magistrate adjudging a person to be insane. *In re Atcherley*, 535.

19. *Dismissal of writ.*

On exceptions by defendants, judgment for defendants *non obstante veredicto* was ordered. After entry in the lower court of the judgment *non obstante* plaintiff obtained a writ of error to review it. Held, that under these circumstances the writ should not be dismissed. *Bierce v. Waterhouse*, 594.

20. *Questions previously decided on exceptions.*

A change in the personnel of the court does not of itself justify re-examination of a subsequent writ of error of questions already decided on exceptions in the same case,—assuming that the court has the power to do so. *Bierce v. Waterhouse*, 594.

21. *Findings of fact by a court jury waived.*

There being evidence to sustain a finding of fact made by a circuit court jury waived, it will not be reversed. *Paris v. Kuhaupio*, 657.

22. *Court will not seek error in instructions.*

The appellate court will not seek for error in the giving of instructions excepted to where none is pointed out by the appellant. *Sylva v. Wailuku Sugar Co.*, 602.

APPEAL AND ERROR—Continued.

23. *On point of law.*

On appeal from a district magistrate on the point of law that a demurrer was erroneously sustained, the judgment will be affirmed if any one ground of demurrer though not passed upon, was well taken. *Colburn v. Holt*, 65.

ASSAULT AND BATTERY.

Dangerous weapon.

An assault with a sheathed sword cane is an assault with a weapon obviously and imminently dangerous to life. *Territory v. Maga*, 157.

ASSIGNMENT.

1. *Alienability of interest in income.*

An equitable life interest in the income of land, the legal title of which is held by a trustee subject to division upon an event still in the future, is alienable and its assignment will be enforced in equity. *McCandless v. Castle*, 515.

2. *Partial.*

A partial assignment of such an interest, made without the assent of but with notice to the trustee, is good in equity. *McCandless v. Castle*, 515.

ATTORNEYS.

Liable for costs.

Attorneys are liable for court costs, including cost of commission to take deposition of a witness. *Cardozo v. Sociedade*, 319.

AUCTIONS AND AUCTIONEERS.

Public auctions.

Upon the agreed facts the defendant conducted a public auction within the meaning of the statute. *Territory v. Toyota*, 651.

BAIL.

1. *Parties to action on bond.*

In absence of statute action on a bail bond is properly brought by the obligee though his term of office as sheriff has expired. *Brown v. Lee Chuck et al.*, 4.

2. *Condition of bond—notice to principals.*

A bail bond being conditioned for the appearance of the principals upon the opening day of a court and "thereafter from day to day and from time to time as ordered and directed" an order in open court for the appearance of the principals with notice thereof to the surety is sufficient to sustain an action for default. *Brown v. Lee Chuck et al.*, 4.

BANKS AND BANKING.

1. *License fee.*

Act 25, S. L. 1907, requiring a different fee for a banking license in Honolulu, Hilo and elsewhere in the Territory, is valid. *Trust Co. v. Treasurer*, 262.

BILLS AND NOTES.

1. *Presentment of dishonored draft by subsequent holder.*

One who endorses a sight draft with notice of its dishonor is liable to a subsequent holder without a second presentment to the drawee. *Scott v. Maria*, 389.

2. *Accommodation paper.*

The payee of an accommodation note having requested its execution for the purpose of paying a debt of a third party is under no implied obligation to reimburse the accommodation maker who has paid the note. *Dillingham v. Scott*, 421.

3. *Accommodated party.*

An accommodation note having been made and endorsed for the purpose of paying the debt of a third party not named on the instrument, such third party is in contemplation of law the accommodated party to whom the credit has been loaned, and the testimony of the accommodation maker, knowing the use intended, that he signed at the request and for the accommodation of the payee cannot alter the status of the parties. *Dillingham v. Scott*, 421.

4. *Liability of Endorser—statute of limitations.*

One who endorses a sight draft with notice of its dishonor becomes liable to his endorsee on delivering the draft and the statute of limitations then starts running. *Scott v. Pedro*, 553.

CASES IN HAWAIIAN REPORTS, APPROVED, CITED, DISTINGUISHED OR REVERSED.

Aldrich v. First Judge, 9 Haw. 470, 471; *In re Atcherley*, 650.

Atcherley v. Jarrett, 19 Haw. 511; *Ching Tam Shee v. Oriental Life Ins. Co.*, 664, 665.

Barthrop v. Kona Coffee Co., 10 Haw. 398, 403; *In re Castle*, 436.

Same v. Same; *Atcherley v. Jarrett*, 513.

Bartlett v. Bartlett, 13 Haw. 307, 308; *Kauhimahu v. Kauhimahu*, 379.

Bierce v. Hutchins, 16 Haw. 418; *Bierce v. Waterhouse*, 400, 401.

Same v. Same, 18 Haw. 374; *Same v. Same*, 401.

Blake v. Baker, 19 Haw. 264; *Kulike v. Fern*, 281.

Bolte, C., Appeal of, 18 Haw. 241, 242; *In re O. R. & L. Co.*, 546.

Brown v. Carvalho, 9 Haw. 180; *Atcherley v. Jarrett*, 513.

Brown v. Iaukea, 18 Haw. 131; *Blake v. Baker*, 266, 267.

Same v. Same; *Kulike v. Fern*, 297.

Brown v. Spreckels, 18 Haw. 91, 104; *Matsumura v. County*, 499.

Burns v. Afong, 19 Haw. 486; *Nakookoo v. Noholoa*, 671, 680.

Carter v. Carter, 14 Haw. 505; *Bishop etc. v. Oahu Sug. Co.* 185.

Carter v. Gear, 16 Haw. 245; *Territory v. Martin*, 210.

Carter v. Wing Chong Wai Co., 12 Haw. 291, 294; *Colburn v. Holt*, 66.

Castle v. Secretary, 16 Haw. 769, 774; *Emmeluth v. Board of Supervisors*, 174.

CASES IN HAWAIIAN REPORTS, ETC.—Continued.

- Castle v. Smith, 17 Haw. 32, 37-40; Dillingham v. Scott, 561.
- Cha Fook v. Lau Piu, 10 Haw. 308; McBryde Sug. Co. v. Koloa Sug. Co., 119.
- Chapin v. Tisdale, 5 Haw. 52; Est. of Parker, 397.
- Ching Tam Shee v. Hall, 19 Haw. 190; Lau Dan v. Ah Leong, 420.
- Chulan v. Princeville Plant., 5 Haw. 84, 90; Waialua Agr. Co. v. O. R. & L. Co., 450, 451.
- Coffield v. Territory, 13 Haw. 478, 480; Matsumura v. County of Hawaii, 37.
- Cornwell v. Kaiue, 18 Haw. 167; Blake v. Baker, 266, 267.
- Same v. Same; Kulike v. Fern, 281.
- County of Oahu v. Whitney, 17 Haw. 174, 187; Territory v. Lucas, 163.
- Cummins v. Sumner, 3 Haw. 170, 176, 177; Matsumura v. County, 501.
- Dillingham v. Hawaiian Government, 9 Haw. 101, 106; Matsumura v. County of Hawaii, 37.
- Dole v. Gear, 14 Haw. 564; McBryde Sug. Co. v. Koloa Sug. Co., 117.
- Same v. Same, 14 Haw. 554, 556; Vivas v. Kauhimahu, 465.
- Same v. Same; Atcherley v. Jarrett, 514.
- Dowsett v. Kapllau, 3 Haw. 709; Middleditch v. Cathcart, 414.
- Dreier v. Holt, 18 Haw. 179; Estate of Holt, 80.
- Duncan v. Wilder etc. 8 Haw. 411, 413, 414; Matsumura v. County, 501.
- Estate of Banning, 9 Haw. 357; Same, 9 Haw. 359;
- Atcherley v. Jarrett, 513.
- Estate of Hana, 4 Haw. 499; Estate of Ahi, 235.
- Estate of Lopes, 19 Haw. 620; Ching Tam Shee v. Ins. Co., 665.
- Ewa Plantation Co. v. Holt, 18 Haw. 362; In re Taxes Ewa Plantation Co., 73.
- Ex parte Ah Oi, 13 Haw. 534; In re Atcherley, 348, 349.
- Ferreira v. Rapid T. Co., 16 Haw. 406; Bierce v. Waterhouse, 599.
- Fitchie v. Brown, 18 Haw. 52, 74; Atherton v. Campbell, 341.
- Forrester v. Hurtt, 18 Haw. 215; 216; Vivas v. Kauhimahu, 465.
- Foster v. Hayward, 9 Haw. 563; Cardozo v. Sociedade, 321.
- Garrett v. Macfarlane, 6 Haw. 435; Ching Tam Shee v. Hall, 192.
- Gay v. Farley, 16 Haw. 67, 79; Matsumura v. County, 499.
- George v. Holt, 9 Haw. 47; Dowsett v. McCandless, 431.
- Gertz v. Gertz, 5 Haw. 175; Vivas v. Kauhimahu, 466.
- Godfrey v. Rowland, 16 Haw. 377; McCandless v. Castle, 518.
- Government v. Brown, 6 Haw. 750; Kaleikini v. Waterhouse, 361.
- Hackfeld v. King, 11 Haw. 5; Atherton v. Campbell, 341.
- Hackfeld v. Wilson, 13 Haw. 212; Dillingham v. Scott, 561.
- Harris v. Cooper, 14 Haw. 145; Chandler v. Mott-Smith, 227.
- Harris, Assignee, v. Judd, Administrator, 3 Haw. 421; Queen's Hospital v. Cartwright, 57.
- Same v. Same; Estate of Holt, 80.
- Harrison v. Magoon, 16 Haw. 169, 172; Kauhane v. Laa, 527, 528.

CASES IN HAWAIIAN REPORTS, ETC.—Continued.

- Same v. Same, 16 Haw. 332, 334; Kauhane v. Laa, 528, 530.
Haw. Com. Sug. Co. v. Wailuku Sug. Co., 14 Haw. 50; McBryde Sug. Co. v. Koloa Sug. Co., 119.
Same v. Same, 15 Haw. 675; Id. 119.
H. C. & S. Co. v. W. S. Co., 14 Haw. 50, 55; Burns v. Afong, 490.
H. C. & S. Co. v. W. S. Co., 14 Haw. 50, 54-55; Nakookoo v. Noholoa, 670.
Haw. T. & Invest. Co. v. Barton, 16 Haw. 294, 301; Queen's Hospital v. Cartwright, 56.
Henrique v. Paris, 10 Haw. 404, 411; Ching Tam Shee v. Hall, 192.
Henrique v. Paris, 10 Haw. 411; Lau Dan v. Ah Leong, 420.
Hoffschlaeger v. Han Same, 4 Haw. 419; Scott v. Maria, 391.
Holstein v. Young, 10 Haw. 216; Blake v. Baker, 267.
H Estate v. Mele, 14 Haw. 311, 312; Booth v. Schnack, 662.
In re Anin, 17 Haw. 336; In re Mills, 94.
In re Assessment of Taxes, Ewa Plantation Co., 18 Haw. 530;
In re Taxes, Ewa Plantation Co., 73.
In re Atcherley, 19 Haw. 346; Same v. Same, 536, 539.
Same v. Same, 19 Haw. 535; Same v. Same, 577, 648.
In re Bankruptcy of Gouveia, 8 Haw. 253; Atcherley v. Jarrett, 513.
In re Estate of Enos, 18 Haw. 542, 547; Estate of Holt, 82.
In re Guardianship of Holt, 11 Haw. 146; Estate of Holt, 80.
In re Lewers & Cooke Ltd., 18 Haw. 625; In re Lewers & Cooke, 47.
In re Same; In re Same, 335, 336.
In re Macfarlane, 11 Haw. 179; Love's Estate, 156.
In re Martello, 19 Haw. 243; Kalaeokekoi v. Wailuku Sug. Co., 372.
In re Trust Co., 17 Haw. 523, 524; Humphreys v. Mello, 469.
In re Walters, 10 Haw. 25; In re Castle, 436.
Kahai v. Kuhia, 11 Haw. 3, 5; In re Castle, 436.
Kailianu v. Lumai, 8 Haw. 508; Nakookoo v. Noholoa, 674.
Kalaeokekoi v. Wailuku Sug. Co., 18 Haw. 380; McCandless v. Honolulu Plantation Co., 242.
Same v. Same; Same v. Same, 371.
Kaleikini v. Waterhouse, 19 Haw. 359, 361; Kona Devl. Co. v. Scott, 593.
Kamalu v. Lovell, 5 Haw. 181; Carpenter v. Lawson, 435.
Kamohai v. Kahele, 3 Haw. 530, 534, 535; Ah Hoy v. Raymond, 573.
Kanakanui v. Leslie, 7 Haw. 223, 225; Ah Hoy v. Raymond, 573.
Kapena v. Bishop, 3 Haw. 793; Love's Estate, 156.
Kapiolani Estate v. Atcherley, 14 Haw. 651; In re Lewers & Cooke, 50, 51.
Kapiolani Estate v. Peck, 14 Haw. 580, 582; Kauhane v. Laa, 527.
Kapiolani Estate v. Territory, 18 Haw. 460, 461; Kalaeokekoi v. Wailuku Sugar Co., 371.
Kapiolani Estate v. Thurston, 16 Haw. 147, 148; Kauhane v. Laa, 527.
Kapiolani Estate v. Thurston, 17 Haw. 312, 346; Dowsett v. McCandless, 431, 432.

CASES IN HAWAIIAN REPORTS, ETC.—Continued.

- Same v. Same, 17 Haw. 312, 323-326; Matsumura v. County, 499.
- Same v. Same, 17 Haw. 324, 325; Sylva v. Wailuku Sugar Co., 681.
- Kauhi v. Liaikulani, 3 Haw. 356; Nakookoo v. Noholoa, 673.
- Kawananakoa v. Puahi, 14 Haw. 72; Kona Devl. Co. v. Scott, 592.
- Keahi v. Bishop, 3 Haw. 546; Nakookoo v. Noholoa, 672-675.
- Kealoha v. Castle, 17 Haw. 415; Bierce v. Waterhouse, 599.
- Kekai v. Limalau, 16 Haw. 464, 465; McCandless v. Lansing, 477.
- Kekoa v. Borden, 5 Haw. 23; Vivas v. Kaupimahu, 467.
- Keliililihune v. Vierra, 13 Haw. 28, 29, 30; Kalamakee v. Wharton, 473.
- King v. Bridges, 5 Haw. 467; In re Mills, 94.
- King v. Cornwell, 3 Haw. 154; Matsumura v. County, 498.
- King v. Hulu, 3 Haw. 82; In re Mills, 97.
- King v. Sherman, 1 Haw. 150; In re Mills, 94.
- King v. Tong Lee, 4 Haw. 335; Territory v. Sing High, 631.
- Nakanelua v. Kaillianu, 5 Haw. 179; Carpenter v. Lawson, 435.
- Nathan v. Vida, 1 Haw. 143; Ching Tam Shee v. Ins. Co., 666.
- Norris v. Herblay, 9 Haw. 514; Atcherley v. Jarrett, 513.
- Notley v. Brown, 16 Haw. 575, 579; Estate of Kamaipialil, 166.
- Same v. Same, 17 Haw. 455; Bierce v. Waterhouse, 599.
- O. R. & L. Co. v. Armstrong, 18 Haw. 260; Mahaia v. Makalei, 556.
- Oahu R. Co. v. Waialua Agr. Co., 16 Haw. 520; Waialua Agr. Co. v. O. R. & L. Co., 448.
- Okuu v. Kaiaikawaha, 7 Haw. 312; Ah Hoy v. Raymond, 571.
- Onomea Sugar Co. v. Austin, 5 Haw. 604; In re Mills, 93.
- Opinion of the Justices, 8 Haw. 602; Chandler v. Mott-Smith, 228.
- Peabody v. Damon, 16 Haw. 447, 451; McCandless v. Lansing, 476.
- Peck v. Bailey, 8 Haw. 658; McBryde Sugar Co. v. Koloa Sug. Co., 119.
- Phillip v. Waller, 5 Haw. 603, 613; Ching Lum v. Lam Man Beu, 365.
- Proper v. Proper, 14 Haw. 596; Nakookoo v. Noholoa, 675.
- Prov. Gov't v. Ah Un, 9 Haw. 164; Atcherley v. Jarrett, 513.
- Prov. Gov't v. Hering, 9 Haw. 181; Atcherley v. Jarrett, 514.
- Prov. Gov't v. Smith, 9 Haw. 178; Atcherley v. Jarrett, 513.
- Queen v. Ah Kiao, 8 Haw. 467; Waldeyer v. Wailuku Sug. Co., 257.
- Rawlins v. Hon. Soap Wks., 9 Haw. 496; Nakookoo v. Noholoa, 680.
- Robertson v. Pratt, 13 Haw. 590, 600; Trust Co. v. Treasurer, 263.
- Same v. Same, 13 Haw. 600; Territory v. Toyota, 655.
- Rooke v. Queen's Hospital, 12 Haw. 375, 389; Estate of Holt, 79.
- Same v. Same, 12 Haw. 380; Williams v. Castle, 339.
- Scott v. Apau, 12 Haw. 157; Carpenter v. Lawson, 435.
- See Yick Wai Co. v. Ah Soong, 13 Haw. 378; McBryde Sug. Co. v. Koloa Sugar Co., 119.
- Silva v. I. I. S. N. Co., 18 Haw. 328, 330; Archer v. Naka, 547.
- Smith v. Hamakua Mill Co., 13 Haw. 245; Nakookoo v. Noholoa, 675.
- Spreckels v. Brown, 18 Haw. 91; Kalaeokekoi v. Wailuku Sug. Co., 371.
- Spreckels v. Circuit Judge, 10 Haw. 198, 206; Atcherley v. Jarrett, 513.

CASES IN HAWAIIAN REPORTS ETC.—Continued.

- Spreckels v. De Bolt, 16 Haw. 476; Kalaeokekoi v. Wailuku Sug. Co., 371.
- Sylva v. Cockett, 12 Haw. 133; Ching Lum v. Lam Man Beu, 364.
- Sun Hop Sing v. Wright, 10 Haw. 260; See Kong v. Chillingworth, 429.
- Tai Kee's case, 12 Haw. 164; Territory v. Sing High, 629, 630.
- Territory v. Ah Choy, 17 Haw. 331; Territory v. Sing High, 631.
- Territory v. Ah Moon, 14 Haw. 203, 204; Kalamakee v. Wharton, 473.
- Territory v. Cotton Brothers, 17 Haw. 608, 611; Kauhane v. Laa, 527.
- Territory v. McCandless, 18 Haw. 616; Territory v. Schaefer, 218.
- Territory v. Miguel, 18 Haw. 402, 404; Emmeluth v. Board, 174.
- Same v. Same; 404; In re Atcherley, 542.
- Territory v. Pottle, 19 Haw. 99, 104; Trust Co. v. Treasurer, 263.
- Same v. Same; Territory v. Matsubara, 645.
- Same v. Same; Territory v. Toyota, 655.
- Territory v. Puahi, 18 Haw. 469; McCandless v. Honolulu Plant. Co., 212.
- Territory v. Richardson, 17 Haw. 231, 236; Sylva v. Wailuku Sugar Co., 681, 682.
- Thurston v. Allen, 8 Haw. 392; Estate of Holt, 79.
- Tibbets v. Damon, 17 Haw. 203; 205; Dowsett v. McCandless, 431.
- Trust Co. v. Treasurer, 19 Haw. 262, 263; Territory of Hawaii v. Toyota, 655.
- Un Wo Sang Co. v. Alo, 7 Haw. 306; In re Lewers & Cooke, 47.
- Same v. Same, 7 Haw. 673; In re Castle, 436.
- Valkenberg v. Treasurer, 14 Haw. 182; Love's Estate, 156.
- Waiialua Agr. Co. v. Oahu R. & L. Co., 18 Haw. 81, 87;
- In re Lewers & Cooke, Ltd., 335.
- Same v. Same, 18 Haw. 81, 86; Waiialua Agr. Co. v. O. R. & L. Co. 448.
- Same v. Same, 18 Haw. 527; Same v. Same, 448.
- Waikulani v. Carter, 12 Haw. 83; Cardozo v. Sociedade, 320.
- Wailuku Sugar Co. v. Cornwell, 10 Haw. 476; McBryde Sugar Co. v. Koloa Sugar Co., 106.
- Wailuku Sugar Co. v. Parke, 4 Haw. 89, 93; McCandless v. Castle, 518.
- Wilder v. Macfarlane, 18 Haw. 121; McCandless v. Honolulu Plant. Co., 241,
- Williams v. Castle, 19 Haw. 337; McCandless v. Castle, 517.
- Wundenberg v. Markham, 14 Haw. 168; Territory v. Hustace, 563.

CERTIORARI.

1. *Grounds for review.*

Certiorari lies to set aside only such proceedings as are absolutely void; not to determine the correctness of findings of fact or the sufficiency of the evidence to support the findings. *In re Atcherley*, 647.

2. *No invalidity found.*

Upon the facts stated in the opinion no invalidity is found in the proceedings of the lower tribunal. *Id.* 647.

COMMERCE INTERSTATE.

1. *Original packages.*

Defendant received in Honolulu a consignment from California of five wooden cases each addressed to him and each containing five tins, each of the latter in turn containing twenty 5 tael tins of opium. Each of the 5 tael tins bore the marks and stamps placed on them by the custom house officer at San Francisco upon the original importation from Hong Kong, as required by treasury regulations. Held, under the decisions relating to the interstate commerce clause of the constitution, the wooden cases and not the 5 tael tins were the "original packages." *Territory v. Lam Yip Kee*, 565.

CONSIDERATION.

1. *Compromise of doubtful claim.*

An agreement by the defendant to pay a certain sum as the value of a horse claimed to have been killed by defendant's horse is based upon sufficient consideration. *Mills v. Mendonca*, 357.

2. *Guardian's promise to pay ward's debt.*

A guardian's promise to pay ward's debts, incurred prior to his appointment, being without consideration, is not actionable. *Kane v. Medeiros*, 564.

CONSTITUTIONAL LAW.

1. *Statute regulating practice of veterinary medicine.*

A statute regulating the practice of veterinary medicine and requiring veterinaries to be licensed, which is applicable only to a town and suburbs with a population of over 5000 inhabitants is unconstitutional and void. *Territory v. Pottie*, 99.

2. *Statute void in part.*

The qualifications for voters under the Municipal Act (S. L. 1907, Act 118) being in conflict with those defined by the Organic Act may be disregarded without impairing the validity of the remainder of the act. *Emmeluth v. Board of Supervisors*, 171.

3. *Who may not question validity of statute.*

One whose rights are not affected by a statute cannot be heard to question it. *Emmeluth v. Board of Commissioners*, 171.

4. *Repeal of exemption.*

A general exemption from taxation for a definite period is repealable by subsequent legislation. *In re Taxes, Pineapple Companies*, 193.

5. *Costs.*

The statute, Sec. 1893 R. L., is not unconstitutional and does not impair the obligation of a contract by requiring the plaintiff to pay the costs when a judgment recovered by him in the district court is reduced one-fifth in the appellate court although the costs

CONSTITUTIONAL LAW—Continued.

exceed the sum awarded him for breach of the contract sued on. *Carpenter v. Lawson*, 433.

6. *Inheritance tax statute.*

The inheritance tax statute (Laws of 1905, Act 102) does not violate the United States Constitution. *Estate of Hall*, 531.

7. *Creation of board of commissioners of insanity.*

The provisions of Act 149 (Laws 1909) creating a board of commissioners of insanity are not in violation of Sec. 81 of the Organic Act. *In re Atcherley*, 535.

8. *Part of statute invalid, part valid.*

Assuming that sections 10 and 14 (Act 149 Laws 1909) are unconstitutional, the remainder of the act is not for that reason invalid. *In re Atcherley*, 535.

9. *Auction license fees.*

Sec. 1343 R. L., is not unconstitutional in its requirement for an auction license of a fee of \$600 for the district of Honolulu and \$15 for each other taxation district. *Territory v. Toyota*, 651.

10. *Detention of insane persons.*

The statutes relating to the commitment of dangerous insane persons by district magistrates requires a judicial trial with notice and opportunity to defend, and affords due process of law. *In re Atcherley*, 346.

11. *Damages to trees in public highway.*

R. L. 636, which limits the amount of damages to be recovered for injury to trees in the public highways, is constitutional. *Humphreys v. Mello*, 458.

12. *Fishing boat license.*

Act 96 S. L. 1907 requiring a license fee of \$5 for a fishing boat with beam of thirty inches or more does not make an arbitrary classification, and is constitutional. *Territory v. Matsubara*, 641.

CONTEMPT.

1. *Judgment of, appeal from, mittimus.*

No appeal lies from the judgment of direct contempt. A mittimus reciting that the petitioner by, etc. was adjudged guilty of direct contempt of court in that he took part in a fight with one T. in the court room when the court was engaged in the trial of a case entitled etc. on etc. and was summarily sentenced to pay a fine of \$10 or be imprisoned until the fine should be paid, for a term not to exceed ten days, and that it appeared that the fine had not been paid, sufficiently complies with the statute requiring that the particular circumstances of the offense be fully set forth. *In re Mills*, 88.

CONTINUANCE.

1. *Abuse of discretion.*

An order denying a motion for a continuance will not be reversed unless, as does not appear in this case, an abuse of discretion is shown. *Waldeyer v. Wailuku Sugar Co.*, 245.

CONTRACTS.

1. *Agreement to pay sewer rates.*

An agreement with the superintendent of public works "to pay such rates annually for the use of the sewers as may be fixed" is enforceable. *Territory v. Brown*, 41.

2. *Construction of condition.*

A condition attached to the transfer of a school that the grantee shall not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the grantor and summarized in the correspondence, is not, as interpreted by surrounding circumstances and subsequent practice, broken by a course of study including morning and evening prayer, compulsory attendance at Sunday school with preparation of the International Sunday School lessons, and compulsory attendance at Christian Endeavor exercises. *Lowrey v. Territory*, 123.

3. *Construction of condition.*

A condition that a school shall be continued as an institution for the cultivation of sound literature and solid science is satisfied by a curriculum including classic and modern literature, geography, physiology, history, agriculture, arithmetic, bookkeeping, algebra and geometry. *Lowrey v. Territory*, 123.

4. *Extrinsic evidence.*

Words in an agreement having an ordinary meaning free from ambiguity and not technical cannot be explained by extrinsic evidence. *Henry v. Shields*, 302.

5. *Construction.*

An agreement whereby a plantation company makes over its plantation to A to cultivate sugar cane and make sugar thereon without charge for the use of it, and declaring that its standing crops are to be the property of A, and that the company will pay for the sugar delivered f. o. b. vessel at company's wharf, \$20 a ton for the season of 1907, \$30 for the season of 1908 and \$50 per ton for the season of 1909, there being no provision in the agreement for securing delivery of the sugar to the company, makes the sugar stored in the warehouse on the plantation prior to delivery to the company subject to levy of execution on judgments by creditors of A, although under the agreement the company advanced all the funds for running the plantation. *Henry v. Shields*, 302.

6. *Consideration, compromise of doubtful claim.*

An agreement by the defendant to pay a certain sum as the

CONTRACTS--Continued.

value of a horse claimed to have been killed by defendant's horse is based upon sufficient consideration. *Mills v. Mendonca*, 357.

7. *Meeting of minds.*

Certain letters held not to constitute a contract, because the minds of the parties did not meet. *Richards v. Ontai*, 451.

8. *Construction.*

Under the agreement mentioned in the opinion, the plaintiff was not a purchaser from the defendants, but merely their agent to sell beef furnished. *Ah Hoy v. Raymond*, 568.

9. *Teacher's appointment—estoppel.*

An accepted appointment as principal of a school is by rules and regulations of the department of public instruction subject to removal or transfer whenever the efficiency of the department would thereby be promoted. An appointee by bringing action claiming that a removal in contemplation of transfer was wrongful is estopped by the pleading from claiming that the department had not acted by a quorum. *Territory v. Scott*, 580.

10. *Right of action by creditor of promisee.*

G. & M. doing business as copartners under the firm name of "Hawaiian Office Specialty Company" purchased of plaintiff in 1905 certain merchandise for the purposes of the business and in 1907 sold to P. the property of the business, P. making no promise to pay the debts of the concern. P. conducted the business under the same name and subsequently sold the property to defendant, the latter agreeing to pay a certain note of \$2000 and "the other and remaining debts of the said Hawaiian Office Specialty Company." Plaintiff brought an action at law against the defendant for the \$2400. Held that if an action is maintainable at all by a creditor of the promisee against the promisor, the creditor not being privy to the contract or to the consideration, the very foundation of any right the creditor may have is the promisor's contract and that in the case at bar plaintiff's claim was not one of the debts "of the Hawaiian Office Specialty Company" at the date of the agreement and therefore there was no promise by defendant to pay it. *Remington Typewriter Co. v. Kellogg*, 636.

CONVERSION.

1. *Demand and refusal.*

In an action for conversion of personal property, demand and refusal is necessary when the original taking is lawful, but not when it is wrongful or there is an illegal assumption of ownership or an illegal user. *Ah Hoy v. Raymond*, 568.

COSTS.

1. The United States Supreme Court having reversed with costs the judgment of this Court sustaining defendant's demurrer, and having remanded the cause, the defendant, who finally prevailed, cannot tax against plaintiffs the costs which it paid pursuant to the mandate of the appellate court. *Lowrey v. Territory*, 179.

2. *Attorneys fees in assumpsit.*

Defendants' attorneys' fees under sec. 1892 R. L. are not taxable in an action of assumpsit dismissed for failure to comply with an order to give security for costs. *Lowrie v. Baldwin*, 258.

3. *Several defendants.*

In an action of assumpsit against several defendants separate cost bills are not allowed under the circumstances of the case. *Lowrie v. Baldwin*, 258.

4. *Liability of attorneys.*

Under R. L. Sec. 1911 and the circuit court rule as to the liability of attorneys for costs, the court has power to tax the costs of a commission as costs of court and hold the attorney of the losing party liable therefor, although such costs were advanced by the opposite party pending the termination of the case. *Cardozo v. Sociedade de San Antonio*, 319.

5. Sec. 1893 R. L. requiring plaintiff to pay costs when judgment recovered by him is reduced one-fifth in appellate court, is constitutional. *Carpenter v. Lawson*, 433.

COUNTIES.

1. *Bonds—limitation with respect to taxable property.*

The limitation in Sec. 55 of the Organic Act of bonded indebtedness of a subdivision of the Territory to a certain percentage of the assessed value of taxable property of such subdivision refers to property taxable by such subdivision, and a county without the power of taxation has no power to issue bonds. *Robinson v. Baldwin*, 9.

2. *Constitutionality of Automobile Ordinance.*

Ordinance 5 of the County of Oahu, relating to the registration, identification, use and operation of motor cars, is not contrary to the 5th or 14th amendments of the Constitution. *Territory v. Schaefer*, 214.

3. *Liability for unauthorized or prohibited acts of servant.*

A county is liable to injury to private property, caused by the negligent act, done in the course of their employment, of road employees engaged to repair a public highway, even though the act was not authorized or was expressly forbidden by the county or was in itself a trespass on the land of third parties other than the plaintiff. *Matsumura v. County of Hawaii*, 496.

COUNTIES—Continued.

4. *Liability for torts.*

A county in Hawaii is liable for injury to private property in the nature of a trespass caused by the negligent act of a road employee while repairing a public highway. *Matsumura v. County of Hawaii*, 18.

COUNTY ATTORNEY.

Appearing in suit against Territory.

It is improper for a county attorney, or his deputy, to appear for the adverse party in a suit against the Territory. *Scott v. Territory*, 578.

COURTS.

1. *Power to make rules.*

Courts have inherent power to make rules for the transaction of their business, and assuming that the rules of the circuit courts of the Republic of Hawaii are no longer in force, the circuit court of the first circuit, in the absence of rules for all the circuits made under R. L. Sec. 1659, has power to make its own rules. *Cardozo v. Sociedade de San Antonio*, 319.

2. *Jurisdiction—effect of defective declaration.*

A garnishee summons should not be quashed for lack of jurisdiction because the declaration omits some of the statutory allegations, there remaining sufficient to set the machinery of the court in motion. *Mills v. Cathcart*, 387.

3. *Opinions, operation and effect of.*

Opinions like other instruments are not to be read as a whole, each part in the light of the remainder. *Waialua Agr. Co. v. O. R. & L Co.* 446.

CREDITOR'S BILL.

1. *Contract for purchase of real estate in wife's name.*

A contract for purchase of real estate in the name of the wife obtained by her husband followed by his part payment on account of the contract is not per se in fraud of subsequent creditors. *Middleditch v. Cathcart*, 410.

2. *Fraudulent conveyance by decedent.*

A creditor's bill brought to reach property fraudulently conveyed by a decedent in his life time need not show that judgment has been obtained against his administrator and a return of nulla bona upon execution thereon. *Estate of Lopez*, 620.

CRIMINAL LAW.

1. *Misdemeanor committed on naval reservation—jurisdiction.*

The territorial district courts have jurisdiction of misdemeanors committed on land reserved for naval purposes. *Territory v. Carter*, 198.

CRIMINAL LAW—Continued.

2. *Private prosecutor.*

An attorney of the complaining witness may assist in the prosecution of a criminal case by consent of the public prosecutor. *Territory v. Chong Chak Lai*, 437.

CUSTOM AND USAGE.

1. *Sufficiency of evidence of.*

The evidence in this case held insufficient to support a finding of a custom, binding upon individuals in the absence of a contract, that compensation for the use of water be paid semi-annually in advance. *Richards v. Ontai*, 451.

DEEDS.

1. *Construction.*

A claim for a liquidated sum of money, arising as an alternative from the refusal of a third party to convey land upon condition broken, is not assigned by a previous conveyance of all lands in or to which the grantor has any claim or demand. *Lowrey v. Territory*, 123.

2. *Operation as constructive assignment.*

An ordinary warranty deed operates in equity as an assignment to the grantee of the grantor's equitable life interest in the income of the property described. *McCandless v. Castle*, 515.

3. *Recital of consideration.*

A recital of consideration in a bill of sale cannot in the absence of fraud or mistake be contradicted between the parties for the purpose of defeating the operation of the instrument. *Ah Hoy v. Raymond*, 568.

DEMURRER.

1. *When sustained.*

A demurrer should be sustained where any one ground thereof is well taken. *Colburn v. Holt*, 65.

2. *Equity practice.*

Averments upon information and belief do not constitute ground of demurrer in equity practice. *McBryde Sug. Co. v. Koloa Sugar Co.*, 106.

DIVORCE.

1. *Collusion in prosecution of suit.*

A libel for divorce brought at the instigation and for the benefit of the defendant upon his agreement to pay the plaintiff money, is properly dismissed on the ground of collusion. *Peleaumoku v. Makaneole*, 68.

2. *Jurisdiction.*

A libel for divorce cannot be brought in a circuit other than that in which the parties last lived together as man and wife, notwithstanding a waiver of all jurisdictional objections. *Martello v. Martello*, 243.

DIVORCE—Continued.

3. *Alimony in case of failure to provide.*

Under the divorce statutes failure to provide is an offense amounting to adultery, and alimony may be allowed in such a case under R. L. Sec. 2237. *Correra v. Correra*, 326.

4. *Extreme cruelty.*

It is not extreme cruelty for a wife to join a sect and obey the instructions of its leader who pretended to be inspired that women members of the sect live with him and apart from their husbands, the evidence showing that the husband's health was not impaired thereby. *Kauhimahu v. Kauhimahu*, 378.

DOWER.

1. *Right of widow of beneficiary of income for life.*

Under a trust to pay income to a testator's widow and children and the survivor of them, and upon the death of any of the children to his or her children; the estate to be divided upon the death of the survivor of the testator's widow and children, the widow of a child dying during the continuance of the trust has no present right of dower from the trust estate. *Williams v. Castle*, 337.

2. *Mutual benefit society fund.*

Under the by-laws of a mutual benefit society a member could designate to whom after his death it should pay a donation fund. The decedent directed it to be paid to his executor for the benefit of his estate. Held, the widow has no statutory dower in this fund although a part of the estate of the decedent. *Estate of Alexandre*, 551.

EASEMENTS.

1. *Estoppel—sale of land with reference to intended roads.*

Where lots on a road shown on a map are sold with a representation that the road, then surveyed and staked out, but not taken over by the government, would be kept open, being an easy and convenient route to reach a park and from there the center of the town, the purchaser of the lots may enjoin the proposed closing of the road. *Hodson v. Wolters*, 342.

EJECTMENT.

1. *Title from common source.*

When it appears in an action of ejectment that both parties claim title from the same grantor neither can take advantage of alleged defects in the chain of title prior to the common source. *McCandless v. Honolulu Plantation*, 239.

2. *Venue may be changed.*

In an action of ejectment the venue may be changed. R. L. Secs. 1647, 1649. *Kalaeokekoi v. Wailuku Sugar Co.*, 366.

EJECTMENT—Continued.**3. Verdict contrary to law.**

In ejectment a verdict for plaintiff claiming title by inheritance the evidence showing that the paper title was in defendant, and the jury being instructed that plaintiff could not also claim by adverse possession, is contrary to law and must be set aside. *Sylva v. Wailuku Sugar Co.*, 385.

4. Death of plaintiff.

Plaintiff in ejectment having died after a verdict in her favor and before defendant's bill of exceptions was allowed, a motion in this court by plaintiff's heirs to be substituted will be denied. Affirming *Kukea v. Keahi*, 10 Haw. 505. *Sylva v. Wailuku Sugar Co.*, 385.

ELECTIONS.**1. Time for filing nomination certificate.**

The statute providing that nomination papers must be filed not less than thirty days before the day of election, the fact that the thirtieth day before fell on a Sunday does not entitle the candidate to file the same on the following Monday. *Chandler v. Mott-Smith*, 225.

2. Validity of statute prescribing time for filing nomination certificate.

R. L. Sec. 31, prescribing the time within which nomination certificates must be filed, is not in conflict with the Organic Act, and is valid. *Chandler v. Mott-Smith*, 225.

3. Pleading—petition.

A petition in an election contest alleging that a certain number of ballots cast for the petitioner were not counted for him by the inspectors, and failing to allege that all the ballots were in the same condition as when cast, is sufficient on demurrer. *Blake v. Baker*, 264.

4. Validity of ballots.

Rulings as to the validity of ballots, as held in *Brown v. Iaukea*, 18 Haw. 131, *Cornwell v. Kaiue*, 18 Haw. 167, *Holstein v. Young*, 10 Haw. 216, are followed. The following ballots are held valid: Where the intersection of the cross was exactly upon the line between the marking spaces for two candidates, and where the arms of one of the crosses were unusually heavy. *Blake v. Baker*, 264.

5. Districts.

Under the Municipal Act of 1907 there is but one election district in which the mayor is elected. *Kulike v. Fern*, 278.

6. Petition for contest—immaterial allegations.

Averments in a petition to contest an election, that in one precinct a certain number of persons voted after five o'clock when the polls should have been closed and that in another precinct a

ELECTIONS—Continued.

tally clerk was unlawfully allowed to remain in the polling place and by conversing in Chinese he attempted to and did influence Chinese voters, are immaterial unless further shown that these matters invalidated or changed the result of the election. *Kulike v. Fern*, 278.

7. *Contest by voters.*

An election cannot be contested by thirty voters unless they all have direct knowledge or information of one or more irregularities which invalidate or change the result of the election. *Kulike v. Fern*, 278.

EQUITY.

1. *Jurisdiction.*

Equity has jurisdiction to enjoin the diversion of water long used under claim of right, upon proper proof of that right, which jurisdiction is not ousted by the creation of a statutory tribunal with authority to decide water controversies. *McBryde Sugar Co. v. Koloa Sugar Co.* 106.

2. *Parties.*

A bill is not demurrable because a person against whom no relief is sought and who, upon the allegations, asserts no right adverse to the plaintiff, has not been made a party. *McBryde Sugar Co. v. Koloa Sugar Co.*, 106.

3. *Pleading.*

A bill for injunction is not demurrable because certain matters are alleged as averment of fact based upon information and belief. *McBryde Sugar Co. v. Koloa Sugar Co.*, 106.

4. *Jurisdiction—venue.*

The equitable jurisdiction of Circuit Judges in one Circuit is not limited to cases other than probate, divorce, guardian and partition matters, arising within their respective circuits. *McBryde Sugar Co. v. Koloa Sugar Co.*, 106.

5. *Injunction staying execution sale.*

Equity will not, under the circumstances stated in the opinion, enjoin an execution sale of land in order to avoid the sacrifice which would result from a sale pending litigation concerning the title, nor on the ground, which was available and had been adjudicated in the action at law, that the land was claimed by the defendant to be exempt from sale on execution. *Atcherley v. Jarrett*, 511.

6. *Injunction to restrain action at law.*

A bill for an injunction to restrain an action at law, there being no equitable feature in the case, does not justify an injunction on the ground that an account is to be taken of such a nature that it "cannot be conveniently and properly justified and settled in an action at law," the bill containing insufficient allegations

EQUITY—Continued.

to sustain a bill for accounting and no prayer for it. *Kona Development Co. v. Scott*, 585.

7. *Relieving tenant from forfeiture of lease.*

A tenant who fails to pay taxes under stipulations of a lease for two weeks may be relieved from the forfeiture of such lease by a court of equity on proper showing. *Lau Dan v. Ah Leong*, 417.

8. *Permanent appropriation of property—injunction.*

Equity may relieve, by injunction, the permanent appropriation of property. *McBryde Sug. Co. v. Koloa Sug. Co.*, 106.

9. *Obstruction on highway.*

Where defendant claims title to land used as a highway, equity will not enjoin an obstruction therein until the title has been adjudicated at law. *Territory v. Hustace*, 562.

10. *Execution sale on judgment against decedent—injunction—estoppel.*

A judgment creditor who had obtained allowance of his claim based upon a judgment against the decedent in his lifetime, may thereby be estopped in equity from causing the land of the decedent to be sold on execution issued on such judgment. *Ching Tam Shee v. Oriental Life Ins. Co.*, 663.

11. *Relief against forfeiture of lease.*

In the absence of fraud, accident, mistake, or surprise, equity will not relieve against the forfeiture of a lease for breaches of covenants to repair buildings. *Ching Tam Shee v. Hall*, 190.

ESTOPPEL.

1. *Judgment against tenant, effect on landlord.*

A judgment in ejectment in favor of M. against a tenant does not estop the landlord from subsequently bringing an action to quiet title to the same land against M. even though the landlord openly, avowedly and to the knowledge of plaintiff defended the ejectment action in the tenant's name. *Dowsett Co. v. McCandless*, 430.

2. *Reliance necessary.*

There is no estoppel when the party claiming it did not rely upon the alleged representation and was not misled by it. *Richards v. Ontai*, 451.

3. *Former judgment.*

In an equity suit the issue was whether a promise had been made with intent not to keep it and the decision, as construed by this court, was that no promise whatever had been made. The decree dismissing the bill, based on the decision, bars a subsequent action at law on the same promise. *Burns v. Afong*, 486.

ESTOPPEL—Continued.**4. Former judgment.**

An adjudication upon a petition for administration on the estate of a person dying testate concerning the correctness of a translation of the will and to the effect that it devised all property wherever situate is conclusive in an action to quiet title between the same parties relating to real estate left by the decedent. *Nakookoo v. Noholoa*, 667.

5. Easement—sale of land with reference to intended road.

Where lots on a road shown on a map are sold with a representation that the road, then surveyed and staked out, but not taken over by the government, would be kept open, the same being an easy and convenient route to reach a park and from there the center of the town, the purchaser of the lots may enjoin the proposed closing of the road. *Hodson v. Wolters*, 342.

EVIDENCE.**1. Opinions and conclusions.**

In an action upon a contract free from ambiguity, evidence of one of the parties as to his opinion, understanding or conclusions as to the meaning of the contract is inadmissible. *Henry v. Shields*, 302.

2. Admissions against interest.

An account book shown to have been in the handwriting of the deceased person is admissible in support of a claim against his estate as an admission against interest. *Kaleikini v. Waterhouse*, 359.

3. Cross-examination.

A witness may be cross-examined as to matters brought out on direct examination which would otherwise be inadmissible. *Ching Lum v. Lam Man Beu*, 363.

4. Translation of interpreter.

In order to impeach a witness the English translation of evidence which he gave in Chinese through an interpreter at a former trial cannot be testified to by one unacquainted with the Chinese language, even though the interpreter was absent from the jurisdiction, at least until it appears that there was no one else available who could testify to what the witness said in Chinese. *Ching Lum v. Lam Man Beu*, 363.

5. Parol evidence to explain contract.

Acts and declarations of the parties prior to or contemporaneous with the execution of a lease are inadmissible in aid of its construction. *Richards v. Ontai*, 451.

6. Id.—practical construction.

Practical construction of a lease is inadmissible to show its meaning where its language is clear and unambiguous. *Richards v. Ontai*, 451.

EVIDENCE—Continued.

7. *Scintilla.*

A mere scintilla of evidence is insufficient to support a finding. *Richards v. Ontai*, 451.

8. *Conclusion of witness.*

The conclusion drawn by a witness from what he has seen on the ground following an accident, is incompetent. *Matsumura v. County of Hawaii*, 496.

9. *Harmless admission.*

The admission of incompetent evidence of a material fact is an error without prejudice when the fact is proved by other competent and undisputed evidence. *Matsumura v. County of Hawaii*, 496.

10. *To support verdict.*

Where the evidence is conflicting, the decision of the jury will not be disturbed. *Kauhane v. Laa*, 526.

11. *Identity of land—evidence of one not surveyor.*

A witness familiar with land and its location and possession by plaintiff, may, though not a surveyor, testify to the identity of such land. *Mahiai v. Makalei*, 565.

12. *Inadmissible to contradict writing.*

In an action at law an instrument purporting to be an absolute assignment cannot be shown by parol evidence to have been intended as collateral security only. *Ah Hoy v. Raymond*, 568.

EXCEPTIONS, BILL OF.

1. *Transcript.*

A transcript of evidence not made a part of a bill of exceptions by reference or otherwise, cannot be considered. *Kalamakee v. Wharton*, 472.

2. *Amendment of bill of exceptions.*

A continuance in this court for the purpose of applying to the trial court for an amendment of a bill of exceptions will not be granted in the absence of a showing of grounds for the amendment. *Kalamakee v. Wharton*, 472.

3. *Burden of sustaining error.*

The burden of sustaining allegations of error is upon the appellant. Exceptions for the determination of which a transcript is necessary must, in its absence, be overruled. *Kalamakee v. Wharton*, 472.

4. *Extension of time for.*

An extension of time for filing a bill of exceptions can be validly granted only within the time allowed by statute or within any prior extension of time. *Kauhane v. Laa*, 526.

5. *Id.* The ruling on a motion for a new trial does not suspend the judgment or operate as an extension of time within which to

EXCEPTIONS, BILL OF—Continued.

incorporate a bill of exceptions otherwise barred. *Kauhane v. Laa*, 526.

6. *Dismissal of bill.*

If one or more exceptions are properly incorporated in the bill and presented in time, neither the bill nor the remaining exceptions can be dismissed. *Kauhane v. Laa*, 526.

7. *Presentation.*

A bill of exceptions must be presented to the judge who presided at the trial. With certain exceptions not applicable in this case presentation to another judge will not suffice. *Booth v. Schnack*, 659.

8. *Id—absence of judge.*

Mere absence of the presiding judge from the court house the judge being in the city and accessible, will not excuse failure to present to him a bill of exceptions. *Id.* 659.

EXECUTORS AND ADMINISTRATORS.

1. *Sale of real estate.*

An order for the sale of real estate to pay debts is properly vacated, before confirmation of the sale, when it appears that it was made before the time for filing claims had expired, with no showing that the personalty had proved insufficient, upon insufficient jurisdictional allegations, and with no notice to the heirs. *Estate of Kamaipialii*, 163.

2. *Unnecessary legal expenses.*

Estates of decedents should not be subjected to unnecessary legal expenses and an attempted sale of the real estate of minors to pay unnecessary fees is expressly disapproved. *Estate of Kamaipialii*, 163.

3. *Liability for disposition of personalty.*

A bill originally charging conspiracy and fraud and now sought to be maintained against an executor for wrongfully disposing of a leasehold of the estate is properly dismissed upon the finding of the trial judge, warranted by the evidence, that the executor received consideration and was acting in what he believed the best interests of the estate. *Savidge v. Antone*, 329.

4. *Appointment of executor.*

A will appointing two daughters, M. and M. B., "to be the sole executors of this my will," and directing that if the testatrix should die before M. "and" M. B. shall be of full age the H. T. Co. should "act as such executor and trustee until they the said Muriel Campbell and Mary Beatrice Campbell shall reach their majority and are qualified to act as such executrices and trustees" (the company and the daughters having been appointed trustees under the will), the elder daughter coming of age after

EXECUTORS AND ADMINISTRATORS—Continued.

the death of the testatrix and before the will is probated is entitled to letters testamentary with the H. T. Co. This construction presents less difficulty than any other, "their" majority being construed as meaning "as they respectively reach the age of majority" and "and" to mean "or." *Estate of Parker*, 393.

5. *Suit to set aside fraudulent conveyances.*

An administrator of an insolvent estate has no authority to bring a suit to set aside a conveyance of real estate made by the decedent in fraud of creditors. *Estate of Lopez*, 620.

FORFEITURE.

Lessee's nonpayment of taxes.

The forfeiture of a lease upon the failure for about two weeks to perform a lessee's covenant to pay taxes may be relieved in equity. *Lau Dan v. Ah Leong*, 417.

FRAUD.

Defense at law.

When in an action at law a party relies upon a bill of sale, the defense that it was obtained by fraud is available to the other party. *Ah Hoy v. Raymond*, 568.

FRAUDS, STATUTE OF.

Promise to save harmless.

The promise to save the maker of a note harmless from any claim on the note is an original undertaking and not within the statute of frauds. *Dillingham v. Scott*, 554.

GARNISHMENT.

1. *Procedure under sequestration statute.*

Under R. L. Sec. 2115A and 2115B a garnishee is entitled to any lawful set-off accruing before final judgment, but may be ordered to pay a sum equal to 25 per cent. of the salary of an employee accruing from and after judgment irrespective of set-off. *Shaw v. Boyd*, 83.

2. *Government beneficiaries.*

By the provisions of Ch. 136 R. L. the salary of a territorial senator is subject to garnishment to the extent of twenty-five per cent. for payment of his debts, and as the clerk of the senate pays the salary on the warrant of the territorial auditor, those officials are properly served with garnishee process. The statute is not against the 14th amendment nor in conflict with Secs. 25 or 55, Organic Act. See *Kong v. Chillingworth*, 428.

3. *Examination of judgment debtor.*

The issuance of an execution is not a condition precedent to the making of an order, under R. L. Sec. 2117, for the examination of a judgment debtor. *Hawaiian News Co. v. McBride*, 625.

GARNISHMENT—Continued.

4. *Id.—power of magistrates.*

District magistrates are authorized to make such orders in proper cases. • *Hawaiian News Co. v. McBride*, 625.

GUARDIAN AND WARD.

Promise to pay ward's debts.

A guardian's promise to pay ward's debts, incurred prior to his appointment being without consideration, is not actionable.

Kane v. Medeiros, 564.

HABEAS CORPUS.

1. *Review of fact on which contempt is adjudged—fighting in court.*

The court will consider in habeas corpus whether the facts on which a contempt was adjudged constitute the offense but will not question their truth nor allow them to be contradicted. Fighting in the presence of the court is prima facie culpable. *In re Mills*, 88.

2. *Detention of leper suspect.*

Upon habeas corpus questioning the legality of the detention of a leper suspect, the only issue is the legality of the proceedings under the statute, and the existence or nonexistence of leprosy will not be determined collaterally. *In re Maunakea*, 218.

3. *Insane person—appeal as supersedeas.*

An appeal in a habeas corpus case is properly advanced for hearing and the appeal operates as a supersedeas of the judgment appealed from. An appeal by the defendant lies from an order of a district magistrate committing a person to the insane asylum upon a finding by the magistrate that he is insane and that the public safety requires his restraint until he become of sound mind, but pending such appeal, the order may be enforced upon good cause shown under Sec. 1861 R. L. *In re Atcherley*, 346.

4. *Inmate insane asylum.*

Writ denied in behalf of a person confined at the insane asylum it being discretionary in such case, the illegality of the confinement having already been considered in several aspects, (In re Atcherley 19 Haw. 535) and other grounds of alleged illegality being named in a writ of certiorari now pending; the remaining grounds being reviewable, if at all, on error. *In re Atcherley*, 576.

HIGHWAYS.

1. *Method of closing.*

A public highway can be closed only by the method prescribed by statute, and no representations by public officers would justify a land owner in closing it by fencing. *Robello v. County of Maui*, 168.

HIGHWAYS—Continued.

2. *Effect of lease.*

The leasing of public land under a right of purchase lease does not extinguish a highway existing across it, particularly when the highway is marked as an "old road" upon the government map referred to in the lease. *Robello v. County of Maui*, 168.

3. *Ownership of fee.*

In the absence of any showing to the contrary, land taken in 1902 and thereafter used as a public highway is presumed to be owned by the Territory in fee simple. *Humphreys v. Mello*, 468.

4. *Status as to trees in.*

R. L. Sec. 636, which limits the amount of damages to be recovered for injury to trees in the public highways, is constitutional. *Humphreys v. Mello*, 468.

HUSBAND AND WIFE.

1. *Attorney's fee for defending wife in divorce suit.*

The husband is not liable at law for the fee of an attorney in defending the wife in a libel for divorce. *Vivas v. Kauhi-mahu*, 463.

2. *Contract for necessities—scire facias.*

A married woman may contract to pay for articles which are necessities, and confess judgment in an action therefor. A defense available in the action cannot be made in scire facias proceedings for the first time if there was jurisdiction over the case. *Sachs Company v. Hart*, 494.

INFANTS.

Disaffirmance of deed.

On the undisputed facts it is held as a matter of law that mere silence for two years and ten months after majority did not prevent an Hawaiian girl from disaffirming her deed made when fifteen years of age, and that she was not estopped from so doing by a foreclosure sale of the land during her minority. *McCandless v. Lansing*, 474.

INJUNCTION.

1. *Permanent appropriation of property.*

Permanent appropriation of property may be an irreparable injury for which the law gives no adequate remedy, but which equity will relieve, by injunction, without showing irreparable injury in any other sense. *McBryde Sugar Co. v. Koloa Sugar Co.*, 106.

2. *Obstruction in highway.*

Where title in land claimed as a public highway is also claimed by defendants, equity will not enjoin an obstruction of its use for a highway, there being no "strong and imperious necessity" in the case, until the title is adjudicated at law. *Territory v. Hustace*, 562.

INJUNCTION—Continued.

3. *Execution sale of judgment against a decedent—estoppel.*

A judgment creditor who had obtained allowance of his claim against the estate of a decedent may be equitably estopped thereby from causing the land of the decedent to be sold on execution *Ching Tam Shee v. Oriental Life Ins. Co.*, 663.

4. *Closing road.*

Grantor, who sells lots adjacent to a road with the representation that the road will be kept open, may be enjoined from obstructing such roads. *Hodson v. Wolters*, 342.

5. *Staying execution sale to avoid sacrifice.*

Injunction does not lie to restrain execution sale on the ground that it will result in sacrifice to plaintiff. *Atcherley v. Jarrett*, 511.

6. *Restraining action at law on account.*

Injunction does not lie to restrain action at law upon an account there being no equitable feature in the case, and the bill not seeking an accounting nor containing allegations sufficient to support an action for accounting. *Kona Dev. Co. v. Scott*, 585.

INSANE PERSONS.

1. *Due process of law.*

Sec. 1116 R. L. authorizing the commitment of dangerous insane persons by district magistrates upon satisfactory complaint, construed in connection with Sec. 1662 R. L. giving such magistrate power to try and determine all statutory proceedings, requires a judicial trial with notice and opportunity to defend, and affords due process of law. *In re Atcherley*, 346.

2. *Due process of law.*

The procedure prescribed by Act 149 (laws 1909) relating to the examination and committal of persons alleged to be insane secures to such persons due process of law within the meaning of the constitutional requirements on the subject. *In re Atcherley*, 535.

INSTRUCTIONS.

1. *Error in, not specifically pointed out.*

The appellate court will not seek for error in instructions excepted to where none is pointed out by the appellant. *Sylva v. Wailuku Sug. Co.*, 602.

2. *Malicious prosecution—probable cause.*

In malicious prosecution an instruction that "A person commencing a prosecution for a crime committed against his person or property is not required to act with the same impartiality and freedom from prejudice in drawing his conclusions as to the guilt of the accused as a person entirely disinterested would be," is not erroneous. *Ching Lum v. Lam Man Beu*, 363.

INTEREST.*Time from which it runs.*

On rent accrued on an instrument in writing interest runs, under R. L., Sec. 2693, from the date when the rent became due, even though its amount was not expressed in the instrument. *Waialua Agr. Co. v. O. R. & L. Co.*, 446.

INTERNAL REVENUE.*Stamp duty—conveyance in consideration of corporate shares.*

A conveyance from certain persons to a corporation organized by themselves in consideration of shares of stock of the corporation is chargeable with stamp duty under R. L. Sec. 1315. *In re Robert Love Estate*, 154.

JUDGE.*Disqualification.*

A judge is not disqualified under Sec. 84, Organic Act, from sitting at the trial of a cause upon the facts in issue by reason of having sustained a demurrer to the plaintiff's declaration, which ruling was reversed by the appellate court. *Matsumura v. County of Hawaii*, 197.

JUDGMENT.*Estoppel.*

In an action of ejectment judgment for defendant on demurrer is a bar to a second action for the same piece of land brought by the same plaintiff against the same defendants where the allegations in the complaints in the two actions are the same in all material respects. *Archer v. Naka*, 547.

JURISDICTION.*Probate court—contempt.*

A judge in probate has statutory authority (Sec. 1648 R. L.) to compel an administrator to obey an order to pay a creditor a dividend of forty per cent. as paid other creditors, although the administrator has been discharged on a hearing of his petition for allowance of final accounts and discharge, at which hearing the creditor was not present not having received notice of it and his claim not having been considered.

Enforcement by contempt proceeding of the administrator's official duty to make such payment is not within the prohibition in the Organic Act (Sec. 10) against imprisonment for debt. *Estate of Ahi*, 232.

JURY.*1. Harmless irregularity in drawing.*

Advantage cannot be taken of an irregularity in the drawing of the trial jurors unless it clearly appears that the party objecting was injured. *Matsumura v. County of Hawaii*, 496.

JURY—Continued.**2. Instructions.**

When the question of ownership is one of mixed fact and law, its submission to the jury should be accompanied with instructions giving specific definitions of ownership applicable to any findings of fact which the evidence may justify. *Ah Hoy v. Raymond*, 568.

LANDLORD AND TENANT.**1. Summary possession.**

An action of summary possession against the lessee cannot be brought by one owning an undivided two-thirds interest of the lessor without alleging that the lessee is not entitled to the other one-third. *Colburn v. Holt*, 65.

2. Equity—relief against forfeiture.

In the absence of fraud, accident, mistake, or surprise, equity will not relieve against the forfeiture of a lease for breaches of covenants to repair buildings and to build and maintain sidewalks. *Ching Tam Shee v. Hall*, 190.

3. Construction of lease.

Under a lease the material portions of which are set forth in the opinion, it is held that the grant to the lessee includes all of the flow of an artesian well on the excepted premises other than water sufficient for the excepted buildings and grounds in the condition in which they were at the date of the lease. *Richards v. Ontai*, 451.

4. Fire claim award.

Under Act 15 of the Laws of 1901 a lessee whose only right with reference to the buildings on the demised land is to use them during the unexpired term of the lease, is not entitled to damages for the loss of such use. *Estate of Brash*, 522.

LEASE.**Relief from forfeiture of.**

Equity will grant relief from forfeiture of a lease by failing to pay taxes, the lessee soon after forfeiture offering to pay the taxes. *Colburn v. Holt*, 65.

LEPROSY.**1. Proceedings under statute.**

A leper suspect in custody having selected a physician to examine her in accordance with the statute, and being thereafter required without legal cause to select another, cannot be held to have waived her rights; and subsequent proceedings with the second physician are void. *In re Maunakea*, 218.

2 Construction of statute.

R. L. Sec. 1122A applies to all persons in custody as leper suspects, whether arrested under warrant or not. *In re Maunakea*, 218.

LIMITATIONS, STATUTE OF.

1. *Action to recover possession of land—entry.*

The term "entry" used in the statute refers to the common law extrajudicial remedy of one who is ousted from his freehold, whereby to regain possession. *Sylva v. Wailuku Sugar Co.*, 681.

2. *Principal and agent.*

In the absence of a demand, the statute of limitations does not begin to run in favor of the fiduciary agent managing his principal's estate until the death of one party. *Kaleikini v. Waterhouse*, 359.

3. *Action against endorser.*

The liability of endorser of a sight draft with notice of dishonor accrues upon delivery of draft and limitation then starts running. *Scott v. Pedro*, 553.

4. *Payment on interest on mortgage debt.*

Payment on interest of a debt secured by mortgage interrupts the running of the statute, and it starts again running from the time of such payment. *Warren v. Nahea*, 382.

MALICIOUS PROSECUTION.

1. *Advice of counsel.*

In malicious prosecution the defendant may show that in causing the arrest of plaintiff he acted on the advice of counsel. *Ching Lum v. Lam Man Beu*, 363.

2. *Instructions,—probable cause.*

In malicious prosecution an instruction that "A person commencing a prosecution for a crime committed against his person or property is not required to act with the same impartiality and freedom from prejudice in drawing his conclusions as to the guilt of the accused as a person entirely disinterested would be," is not erroneous. *Ching Lum v. Lam Man Beu*, 363.

MANDAMUS.

Right of citizen and taxpayer.

The right of a citizen and taxpayer to mandamus against public officers acting under a statute alleged to be void, based upon an anticipatory refusal, is not passed on in view of waiver of the point by defendants and the sustaining of a demurrer on other grounds. *Emmeluth v. Board of Supervisors*, 171.

MASTER AND SERVANT.

1. *Safe place to work.*

The obligation of the employer to provide a safe place to work in does not, however, include places made dangerous by the progress of the work. *Mejea v. Whitehouse*, 159.

2. *Fellow servant.*

The foreman in charge of a gang excavating an earth bank is a fellow of the laborers and the employer is not responsible for

MASTER AND SERVANT—Continued.

injury to the laborer resulting from his negligence. *Mejea v. Whitehouse*, 159.

MORTGAGE.

Injunction against foreclosure—statute of limitations.

A bill to restrain foreclosure of a mortgage on the ground that the mortgage debt had been paid is properly dismissed upon a finding sustained by the evidence that payments of interest in advance had been made to include a period within ten years. *Warren v. Nahea*, 382.

MUNICIPAL CORPORATIONS.

Creation in Hawaii.

Sec. 56 of the Organic Act authorizes the creation of county and city municipalities by special act, superseding, in respect to Hawaii, the general prohibition of act of July 30, 1886, ch. 818. The provisions in Sec. 55 prohibiting the granting of private charters and special franchises do not apply to municipal corporations. *Emmeluth v. Board of Supervisors*, 171.

MUNICIPAL ACT.

1. *Power of treasurer.*

Under Sec. 138 of the Municipal Act the city and county treasurer may refuse to pay a warrant based upon an illegal claim. *Coster v. Trent*, 352.

2. *Appointing power.*

Under the Municipal Act (Act 118, S. L. 1907) the board of supervisors has no power to appoint or employ employees of the road department. *Coster v. Trent*, 352.

NEW TRIAL.

1. *Transcription of stenographer's notes.*

A new trial is not a matter of right when the stenographer fails to file his transcribed notes within the time specified in R. L. Sec. 1800. *Territory v. Maga*, 157.

2. *Newly discovered evidence.*

Exception to granting a new trial on the ground of newly discovered evidence is not sustained, the evidence appearing to be material. *Charman v. Charman*, 380.

NOTICE.

To one of several having a common interest.

Notice to one of several persons having common interests in the same subject matter operates as notice to all. *Brown v. Lee Chuck et al.*, 4, 8.

OFFICERS.

Employees.

A clerk of court who made typewritten copies of the report of

OFFICERS—Continued.

the tax commission working out of office hours is not an officer or employee of the Territory within the meaning of the appropriation bills. *In re Peck*, 181.

PARTIES.*Obligee named in bond.*

A sheriff named in a bail bond as obligee is a proper party plaintiff on the bail bond in an action brought after the expiration of his term of office, there being no statute regulating the same. *Brown v. Lee Chuck*, 4.

PARTITION.*1. Cotenant's right to—*

A cotenant is entitled to a partition of his share in the common estate, or a sale if partition would greatly prejudice the parties. The fact that there are minor cotenants unable to purchase does not affect such right. *Brown v. Holmes*, 268.

2. Allowance for improvements.

A cotenant cannot be allowed in case of sale for money expended for improving a small portion but not materially enhancing the value of the entire estate. *Brown v. Holmes*, 268.

PLEADING.*1. Action against Territory.*

In an action against the Territory on a contract made by certain officers of the house of representatives the petition should show that they had authority to make the same. *Lloyd v. Territory*, 491.

2. Action against Territory.

In an action against the Territory on an authorized contract made by certain officers of the house of representatives the petition showing that such contract was ratified by the house is good on demurrer. *Lloyd v. Territory*, 520.

3. Sufficiency of allegation.

The declaration held to sufficiently allege (a) an express promise by an accommodation party to a promissory note to save the other accommodation party harmless in the transaction, and (b) a consideration for the promise. *Dillingham v. Scott*, 554.

POLICE REGULATION.*County ordinance.*

A county ordinance making it a misdemeanor to construct or erect any building or structure designed or intended to be used for a lodging or tenement house within five hundred feet of any public school premises is not an exercise of power granted to boards of supervisors by Act 39 S. L. 1905, Sec. 62, Par. 5. "To

POLICE REGULATION—Continued.

regulate by ordinance within the limits of the county all local police, sanitary and other regulations." *Territory v. Muranaka*, 321.

PRACTICE.

Appeal on points of law.

On appeal from a district magistrate on the point of law that a demurrer was erroneously sustained, the judgment will be affirmed if any one ground of demurrer, though not passed upon, was well taken. *Colburn v. Holt*, 65.

PRINCIPAL AND AGENT.

Acts of agent.

The acts of an agent made with the knowledge of his principal cannot thereafter be repudiated by the latter. *Hao v. Hutchinson Plantation Co.*, 315.

PRINCIPAL AND SURETY.

Discharge of surety by variation of risk.

The plaintiff in a replevin action having alleged in its declaration and replevin bond the actual value of the property replevied to be \$15,000, and the defendant in that action having given a return bond in double the amount reciting the valuation as alleged, subsequent amendments whereby the plaintiff increased the valuation to \$22,000 and recovered alternative judgment for that amount are a variation of the risk of the sureties on the return bond and discharge them from liability. *Bierce v. Waterhouse*, 398.

PROCESS.

Return of service.

A return of service is not invalidated by failure to show that it was made as required by statute by delivery of a certified copy of the summons and petition. *Sachs Company v. Hart*, 494.

PROSECUTING ATTORNEYS.

Deputy county attorney.

A deputy county attorney may appear for the Territory in a criminal case. *Territory v. Lucas*, 162.

PUBLIC LANDS.

Right to patent by lessee of right of purchase lease.

A lessee under a right of purchase lease of public lands who applies for a patent satisfies the statutory prerequisite that he "has resided thereon not less than two years" by showing that he has for that period maintained on the premises a permanent and fixed abode with the present intention there to remain. *Hapai v. Pratt*, 1,

REGISTRATION OF LAND TITLES.

Practice.

The petition for registration of a parcel of land having been denied in toto in consequence of an adverse claim to a portion of the parcel, this court, upon appeal, modifies the decree so that it shall be without prejudice to the claim to the uncontroverted portion. *In re Lewers & Cooke, Ltd.*, 334.

REHEARING.

When denied.

A petition for rehearing will be denied when it discloses no good reason for granting a rehearing, or modifying the original decision. *In re Lewers & Cooke, Ltd.*, 47.

RESERVED QUESTION.

Question must not be ruled on by trial court.

Questions ruled upon by the trial court cannot be reserved to this court under Sec. 1862 R. L. *McCandless v. Lansing*, 467.

SET-OFF AND COUNTERCLAIM.

Store account of employee.

Under R. L. Sec. 2698 the written consent of an employee to the set-off of his store account may be general and given in advance. *Shaw v. Boyd*, 83.

SEWER.

Contract to pay rates.

The voluntary agreement made by an owner of real estate to pay such rates as may be fixed annually for use of sewer, while not authorized by statute, is enforceable. *Territory v. Brown*, 41.

STARE DECISIS.

When applied.

The doctrine of *stare decisis* is not applied to the case of a purchaser who purchases *pendente lite* with knowledge of the adverse claimant's pending action of ejectment to recover the property. *In re Lewers & Cooke*, 47.

STATUTES CITED, CONSTRUED, APPLIED, ETC.

UNITED STATES STATUTES.

Organic Act, Sec. 1, *Robinson v. Baldwin*, 13.

“ “ “ 5, “ “ “ 17.

“ “ “ 5, *Territory v. Martin*, 202, 204.

“ “ “ 6, *Territory v. Carter*, 200.

“ “ “ 6, *Territory v. Martin*, 202, 204, 209, 210, 213.

“ “ “ 7, *Territory v. Martin*, 209, 213, 214.

“ “ “ 10, *Estate of Ahi*, 234.

“ “ “ 25, *See Kong v. Chillingworth*, 428.

UNITED STATES STATUTES—Continued.

Organic Act, Sec. 34, Chandler v. Mott-Smith, 227.

- " " " 40, Chandler v. Mott-Smith, 227.
- " " " 49, Robinson v. Baldwin, 12.
- " " " 55, Robinson v. Baldwin, 11, 12, 13.
- " " " 55, Lowrey v. Territory, 148.
- " " " 55, Emmeluth v. Board, 172, 176, 177.
- " " " 55, See Kong v. Chillingworth, 428.
- " " " 55, Territory v. Matsubara, 643-647.
- " " " 60, Chandler v. Mott-Smith, 226, 227.
- " " " 62, Chandler v. Mott-Smith, 226, 227.
- " " " 81, Territory v. Carter, 201.
- " " " 81, Territory v. Martin, 208, 209.
- " " " 81, In re Atcherley, 538, 539.
- " " " 84, Matsumura v. County, 197. ,
- " " " 86, In re Taxes, 73.
- " " " 91, Territory v. Carter, 192, 199.
- " " " 95, Territory v. Matsubara, 643-647.

Rev. Stat. Sec. 691, In re Taxes, 74.

- " " " 692, In re Taxes, 74.
- " " " 711, Territory v. Martin, 202.
- " " " 1839, Emmeluth v. Board, 178.
- " " " 1891, Territory v. Martin, 203.
- " " " 1895, Emmeluth v. Board, 178.
- " " " 5352, Territory v. Martin, 203.
- " " " 5356, Territory v. Martin, 213.
- " " " 5595, Territory v. Martin, 203.

9 Stat. at Large, p. 634, In re Lewers & Cooke, 48.

- 12 " " " p. 501, Territory v. Martin, 202, 203.
- 20 " " " p. 101, Emmeluth v. Board, 178.
- 22 " " " Ch. 47, Territory v. Martin, 203.
- 23 " " " p. 24, Ch. 57, Sec. 38, In re Taxes, 74 .
- 23 " " " p. 24, Territory v. Martin, 212.
- 24 " " " p. 170, Robinson v. Baldwin, 14.
- 24 " " " p. 170, Emmeluth v. Board, 172, 175.
- 24 " " " p. 635, Territory v. Martin, 203.
- 25 " " " p. 33, Territory v. Martin, 206.
- 25 " " " Ch. 866, p. 433, In re Taxes, 73.
- 30 " " " p. 252, Robinson v. Baldwin, 14, 15.
- 33 " " " p. 1035, Bierce v. Waterhouse, 597.

HAWAIIAN STATUTES.

Rev. Laws, Sec. 1, Brown v. Lee Chuck, 7.

- " " " 8, Lowrey v. Territory, 134.
- " " " 13, Territory v. Schaefer, 217.
- " " " 15, Estate of Parker, 397.

HAWAIIAN STATUTES—Continued.

Rev. Laws, Sec.	30,	Emmeluth v. Board,	178.
"	"	"	31, Chandler v. Mott-Smith, 225, 227.
"	"	"	38, Emmeluth v. Board, 178.
"	"	"	87, Kulike v. Fern, 289.
"	"	"	105, Kulike v. Fern, 289.
"	"	"	188, Scott v. Territory, 584.
"	"	"	274, Hapai v. Pratt, 2.
"	"	"	319, Hapai v. Pratt, 2.
"	"	"	322, Hapai v. Pratt, 2.
"	"	"	489, Territory v. Brown, 45.
"	"	"	586, Robello v. County, 169.
"	"	"	593, Humphreys v. Mello, 469.
"	"	"	594, Territory v. Brown, 45.
"	"	"	624, Humphreys v. Mello, 470.
"	"	"	635, Humphreys v. Mello, 470.
"	"	"	636, Humphreys v. Mello, 470.
"	"	"	637, Humphreys v. Mello, 670.
"	"	"	700, Humphreys v. Mello, 469.
"	"	"	722, Humphreys v. Mello, 469.
"	"	"	988, Territory v. Sing High, 630.
"	"	"	994, Territory v. Sing High, 630.
"	"	"	1116, In re Atcherley, 349.
"	"	"	1118, In re Atcherley, 348.
"	"	"	1160, In re Lewers & Cooke, 48.
"	"	"	1164, In re Lewers & Cooke, 48.
"	"	"	1214, In re Taxes, 231.
"	"	"	1215, In re Taxes, 230, 231.
"	"	"	1223, In re Taxes, 194.
"	"	"	1266, Wilder v. Lucas, 351.
"	"	"	1320, In re O. R. & L. Co., 546.
"	"	"	1343, Territory v. Toyota, 651-655.
"	"	"	1345, Territory v. Toyota, 651, 652.
"	"	"	1399, Territory v. Lam Yip Kee, 566.
"	"	"	1551, Territory v. Chong Chak Lai, 438.
"	"	"	1561, Brown v. Lee Chuck, 6.
"	"	"	1647, Martello v. Martello, 343.
"	"	"	1647, Kalaeokekoi v. Wailuku Sug. Co., 366, 367, 370.
"	"	"	1648, McBryde Sug. Co. v. Koloa Sug. Co., 116.
"	"	"	1648, Estate of Ahi, 225.
"	"	"	1648, Martello v. Martello, 243.
"	"	"	1648 Brown v. Holmes, 276.
"	"	"	1648, Kalaeokekoi v. Wailuku Sug. Co., 367, 368, 370.
"	"	"	1649, Kalaeokekoi v. Wailuku Sug. Co., 368, 369, 370.
"	"	"	1654, Booth v. Schnack, 661.
"	"	"	1659, Cardozo v. Sociedade, 319, 320.

HAWAIIAN STATUTES—Continued.

Rev. Laws, Sec. 1662, In re Atcherley, 349.

- " " " 1684, Paris v. Kuhaupio, 658.
- " " " 1700, Territory v. Chong Chak Lai, 441.
- " " " 1721, Sachs v. Hart, 459.
- " " " 1738, Bierce v. Waterhouse, 408.
- " " " 1747, Dillingham v. Scott, 425.
- " " " 1769, Chandler v. Mott-Smith, 228.
- " " " 1779, Matsumura v. County, 497.
- " " " 1782, Matsumura v. County, 497.
- " " " 1795, Matsumura v. County, 497, 498.
- " " " 1798, Kaleikini v. Waterhouse, 362.
- " " " 1799, Territory v. Maga, 159.
- " " " 1800, Territory v. Maga, 158, 159.
- " " " 1833, McBryde Sugar Co. v. Koloa Sugar Co., 116, 117.
- " " " 1834, McBryde Sugar Co. v. Koloa Sugar Co., 116, 117.
- " " " 1834, Kaleikini v. Waterhouse, 362.
- " " " 1834, Kona Devl. Co. v. Scott, 591, 592.
- " " " 1850, Estate of Lopez, 624.
- " " " 1851, Estate of Ahi, 234.
- " " " 1853, Estate of Ahi, 234.
- " " " 1855, Estate of Kamaipialii, 167.
- " " " 1855, Estate of Lopez, 623, 624.
- " " " 1858, In re Mills, 92.
- " " " 1858, Territory v. Schaefer, 218.
- " " " 1858, Atcherley v. Jarrett, 513.
- " " " 1859, Middleditch v. Cathcart, 300.
- " " " 1859, Atcherley v. Jarrett, 513.
- " " " 1861, In re Atcherley, 348, 349.
- " " " 1861, Atcherley v. Jarrett, 513.
- " " " 1861, Bierce v. Waterhouse, 401.
- " " " 1862, McCandless v. Lansing, 467.
- " " " 1862, Booth v. Schnack, 660.
- " " " 1863, Booth v. Schnack, 660.
- " " " 1864, Waldeyer v. Wailuku Sugar Co., 245.
- " " " 1864, Middleditch v. Cathcart, 300.
- " " " 1864, Atcherley v. Jarrett, 513.
- " " " 1864, Kauhane v. Laa, 527.
- " " " 1864, Booth v. Schnack, 660.
- " " " 1865, Middleditch v. Cathcart, 301.
- " " " 1865, Atcherley v. Jarrett, 514.
- " " " 1869, Bierce v. Waterhouse, 599.
- " " " 1873, Bierce v. Waterhouse, 596.
- " " " 1887, Brown v. Lee Chuck, 6.
- " " " 1889, Lowrey v. Territory, 180.

HAWAIIAN STATUTES—Continued.

Rev. Laws, Sec. 1892, Lowrie v. Baldwin, 259, 260.

- “ “ “ 1893, Carpenter v. Lawson, 434.
- “ “ “ 1911, Cardozo v. Sociedade, 319, 320.
- “ “ “ 1988, Sylva v. Wailuku Sugar Co., 605, 683.
- “ “ “ 1989, Sylva v. Wailuku Sugar Co., 605, 606.
- “ “ “ 1990, Sylva v. Wailuku Sugar Co., 683.
- “ “ “ 2000, Lowrey v. Territory, 124.
- “ “ “ 2000, Lloyd v. Territory, 492.
- “ “ “ 2004, Lowrey v. Territory, 147.
- “ “ “ 2009, Territory v. Brown, 42.
- “ “ “ 2084, In re Atcherley, 248.
- “ “ “ 2094, Colburn v. Holt, 67.
- “ “ “ 2102, Bierce v. Waterhouse, 399.
- “ “ “ 2114, Shaw v. Boyd, 87.
- “ “ “ 2115, Shaw v. Boyd, 87.
- “ “ “ 2116, Shaw v. Boyd, 87.
- “ “ “ 2117, Hawaiian News Co. v. McBride, 625, 626, 627.
- “ “ “ 2127, Hawaiian News Co. v. McBride, 626.
- “ “ “ 2130, Mills v. Cathcart, 388.
- “ “ “ 2228, Correra v. Correra, 327.
- “ “ “ 2229, Martello v. Martello, 243.
- “ “ “ 2234, Peleaumoku v. Makaneole, 69.
- “ “ “ 2236, Vivas v. Kauhimahu, 464.
- “ “ “ 2237, Correra v. Correra, 327.
- “ “ “ 2257, Correra v. Correra, 328.
- “ “ “ 2271, Estate of Alexandre, 552.
- “ “ “ 2407, In re Lewers & Cooke, 47.
- “ “ “ 2407, In re Castle, 436.
- “ “ “ 2417, In re Lewers & Cooke, 337.
- “ “ “ 2510, Kauhane v. Laa, 225.
- “ “ “ 2535, Atherton v. Campbell, 340, 341.
- “ “ “ 2542, Atherton v. Campbell, 340, 341.
- “ “ “ 2553, In re Love's Estate, 155.
- “ “ “ 2693, Waialua Agr. Co. v. O. R. & L. Co., 449.
- “ “ “ 2716, Territory v. Muranaka, 326.
- “ “ “ 2717, Territory v. Muranaka, 326.
- “ “ “ 2776, Brown v. Lee Chuck, 7.
- “ “ “ 2779, In re Atcherley, 348.
- “ “ “ 2831, In re Mills, 96.
- “ “ “ 2913, Territory v. Maga, 158.
- “ “ “ 2916, Territory v. Carter, 200.
- “ “ “ 3073, In re Mills, 94, 96.
- “ “ “ 3115, Territory v. Schaefer, 218.
- “ “ “ 3116, Territory v. Schaefer, 218.
- “ “ “ 3128, See Kong v. Chillingworth, 428.

HAWAIIAN STATUTES—Continued.

Rev. Laws, Sec. 3151, Territory v. Martin, 202.

- " " Chap. 52, Robello v. County, 169.
- " " " 84, Territory v. Brown, 43.
- " " " 127, part 2, Sylva v. Wailuku Sug. Co., 682.
- " " " 133, Ching Tam Shee v. Hall, 190.
- " " " 136, See Kong v. Chillingworth, 428, 429.
- " " pp. 1160, 1164, In re Lewers & Cooke, 48.

Laws—Act April 27, 1846, p. 262, Territory v. Chong Chak Lai, 43.

- " " July 11, 1851, Territory v. Chong Chak Lai, 439.
- " 1853, p. 60, Correra v. Correra, 327.
- " 1856, p. 16, McBryde Sugar Co. v. Koloa Sugar Co., 116.
- " 1860, p. 12, McBryde Sugar Co. v. Koloa Sugar Co., 116.
- " Act July 27, 1866, Sec. 5, Territory v. Chong Chak Lai, 439.
- " 1896, Act 64, Territory v. Sing High, 630.
- " 1901, Act 15, Estate of Brash, 522, 524.
- " 1905, Act 39, Ch. 4, Sec. 9, Matsumura v. County, 21, 27.

Laws 1905, Act 39, Matsumura v. County, 19, 33.

- " " " 39, Sec. 90, Territory v. Lucas, 163.
- " " " 39, Sec. 9, Robello v. County, 169.
- " " " 39, Ch. 11, Blake v. Baker, 265.
- " " " 39, Sec. 62, Par. 5, Territory v. Muranaka, 324.
- " " " 39, Coster v. Trent, 355.
- " " " 40, Territory v. Pottie, 99.
- " " " 51, Waialua Agr. Co. v. O. R. & L. Co., 449.
- " " " 52, Robinson v. Baldwin, 10.
- " " " 52, Estate of Holmes v. Fujitani, 575.
- " " " 55, Robinson v. Baldwin, 10.
- " " " 89, Sec. 16, Wilder v. Lucas, 350-351.
- " " " 93, Robinson v. Baldwin, 17.
- " " " 102, Estate of Hall, 532.
- " " " 139, Sec. 36, Emmeluth v. Board, 172.
- " " " 139, Sec. 95, Emmeluth v. Board, 175.

Laws 1907, Act 25, Trust Co. v. Treasurer, 262, 263.

- " " " 41, Robinson v. Baldwin, 10.
- " " " 43, In re Lewers & Cooke, 47.
- " " " 43, In re Castle, 436.
- " " " 56, McBryde Sugar Co. v. Koloa Sugar Co., 116, 117.
- " " " 65, Robinson v. Baldwin, 9, 10, 11, 13, 16.
- " " " 68, Territory v. Schaefer, 218.
- " " " 77, In re Taxes, 194, 230.
- " " " 89, Scott v. Maria, 392.
- " " " 96, Territory v. Sing High, 628, 631.
- " " " 96, Territory v. Matsubara, 642-647.
- " " " 99, Shaw v. Boyd, 85, 86.
- " " 118, Sec. 5, Matsumura v. County, 21, 24.

HAWAIIAN STATUTES—Continued.

Laws 1907, Act 118, Emmeluth v. Board, 172, 173, 178, 179.

“ “ “ 118, Sec. 23, 62, 138, Coster v. Trent, 254-356.

“ “ “ 118, Territory v. Chong Chak Lai, 439.

“ “ “ 118, Sec. 111, Par. 33, Territory v. Chong Chak Lai, 439.

“ “ “ 121, Robinson v. Baldwin, 17.

“ “ “ 122, In re Maunakea, 219-222.

“ “ “ 126, In re Peck, 181, 182.

“ “ “ 127 In re Peck, 182.

“ “ “ 139, Robinson v. Baldwin, 9, 10, 11, 12, 13.

“ “ “ 139, Sec. 2, Kulike v. Fern, 280.

“ “ “ 139, Sec. 40, Kulike v. Fern, 298.

“ “ “ 139, Sec. 57, Kulike v. Fern, 281.

“ “ “ 139, Sec. 76, Kulike v. Fern, 290.

Laws 1909, Act 42, Scott v. Territory, 584.

“ “ “ 149, In re Atcherley, 536, 537, 541, 542, 577, 648, 649.

STATUTES.

1. *Construction.*

The intent of the legislature is to be gathered from the language used, and general considerations of motive should not be resorted to unless the language is obscure and ambiguous. *Shaw v. Boyd*, 83.

2. *Penal statute—Organic Act.*

The Organic Act creating the Territory of Hawaii does not repeal Sec. 3151 Revised Laws of Hawaii. *Territory v. Martin*, 201.

3. *Forced construction.*

Forced construction of language used in an ordinance will not be made when the result of doing so is absurd. *Territory v. Schaefer*, 214.

4. *Meaningless words.*

The second section of a municipal ordinance related solely to motor cars. The eighth section related to chauffeurs, and provided that it should not apply to “those exempt under Section 2.” Held, that the words “those exempt under Section 2” are meaningless and do not affect the balance of the section. *Territory v. Schaefer*, 214.

5. *Corporations—stare decisis.*

An ambiguous statute relating to incorporation having been construed by the court and the construction subsequently affirmed, the court will not now adopt a different construction. *Atherton v. Campbell*, 340.

6. *Construction.*

It is not clear that Sec. 1418I (Act 96, S. L. 1907) relating to laundry licenses, gives power to the treasurer to impose condi-

STATUTES—Continued.

tions for granting such license, but if it does the remainder of the act is not invalid provided it properly requires a certificate of the board of health. *Territory v. Sing High*, 628.

7. *Constitutional.*

The act is not unconstitutional in its requirement of a certificate by the board of health that the proposed location for a laundry is suitable. *Territory v. Sing High*, 628.

8. *Constitutional.*

Act 96 S. L. 1907, requiring a license fee of \$5 for a fishing boat with a beam of 30 inches or more, is not in conflict with Sec. 95, Organic Act, declaring the fisheries in the sea waters of the Territory not included in any fish pond or artificial enclosure free to all citizens of the United States, or under Sec. 55 prohibiting the granting of special privileges or immunities, or because it is discriminatory class legislation or unreasonably classifies boats required to be licensed or prohibits a useful occupation or denies equal and uniform protection of the law, although at the date of the act native Hawaiian outrigger canoes with a beam of less than 30 inches had mainly been replaced in fishing for profit with Japanese boats with a beam of 30 inches or more, since the act applies to all who use such boats for profit. *Territory v. Matsubara*, 641.

SUMMARY POSSESSION.

One tenant in common cannot recover from a cotenant by summary process. *Colburn v. Holt*, 65.

SUMMONS.

Return upon.

A return of service is not invalidated by failure to show that it was made as required by statute by delivery of a certified copy of the summons and petition. *Sachs Co. v. Hart*, 494.

SURETY.

Discharge of by variation of risk.

The plaintiff in a replevin action having alleged in its declaration and replevin bond the actual value of the property replevied to be \$15,000, and the defendant in that action having given a return bond in double the amount reciting the valuation as alleged, subsequent amendments whereby the plaintiff increased the valuation to \$22,000 and recovered alternative judgment for that amount are a variation of the risk of the sureties on the return bond and discharge them from liability. *Bierce v. Waterhouse*, 398.

TAXATION.

1. *Exemption under statute.*

S. L. 1907, Act 77, exempting all property, real and personal,

TAXATION—Continued.

used in the cultivation and production of pineapples does not exempt establishments for canning pineapples.

A proviso that such exemption shall not apply to land in excess of forty acres does not limit the exemption of personal property.

In re Taxes, Pineapple Companies, 193.

2. *Exemptions of growing crops of pineapples.*

Under S. L. 1907, Act 77, exempting all property real and personal, used in the cultivation and production of pineapples, provided that such exemption shall not apply to land in excess of forty acres, growing crops of pineapples on land in excess of forty acres are not exempt. *In re Taxes, Pineapple Companies*, 230.

3. *Valuation of plantation.*

A valuation fixed by a tax appeal court which appears to be fair and just will not be modified in this court unless shown to be erroneous or based on a wrong theory or defective data. *In re Taxes, Makee Sugar Co.*, 331.

4. *Statutes—tax liens.*

S. L. 1905, Act 89, Sec. 16 does not extend the duration of tax liens which had attached prior to the date that the act took effect. *Wilder v. Lucas*, 350.

5. *Inheritance tax—property within Territory.*

Under the inheritance tax statute shares of stock in domestic corporations, owned by a nonresident decedent, are property within this Territory and subject to the provisions of the act. *Estate of Hall*, 531.

6. *Stamp duty—instrument assessable as agreement, not as mortgage.*

An instrument effectuating a reduction in the rate of interest on bonds secured by an existing mortgage and a change in the optional time of payment and continuing the mortgage as security for the new bonds issued bearing the reduced rate of interest, should be stamped as an agreement and not as a mortgage. *In re O. R. & L. Co.*, 544.

TENANCY IN COMMON.

Apportionment of rent.

The rule that rents from property owned by tenants in common and leased to a stranger are apportioned according to the interests of the owners is not altered by the fact that the lease was signed by only one cotenant with the acquiescence of the other.

Kauhane v. Laa, 223.

TENANTS IN COMMON.

Recovery, inter alia.

One tenant in common cannot recover from another by summary possession. *Colburn v. Holt*, 65.

TENDER.

Effect of acceptance.

The acceptance of an absolute and unconditional tender is binding. *Hao v. Hutchinson Plantation Co.*, 315.

TERRITORIES.

Continuance of former laws by Organic Act.

R. L. Sec. 3151, defining and punishing fornication, was continued in force as one of the laws of Hawaii by the Organic Act, notwithstanding the Edmunds-Tucker Act of 1887 covering the same subject. *Territory v. Martin*, 201.

TRIAL.

1. *Motion to direct verdict.*

Where the evidence is conflicting a motion to direct a verdict should be denied. *Sylva v. Wailuku Sugar Co.*, 602.

2. *Instructions.*

In an action of trespass to land various instructions, referred to in the opinion examined, and, although found erroneous in part, held, for the reason stated, not to require a new trial. *Sylva v. Wailuku Sugar Co.*, 602.

3. *Instructions.*

A party cannot be heard to complain of the giving of instructions requested by himself. *Dillingham v. Scott*, 554.

4. *Instructions.*

When the law is sufficiently stated in the instructions given, the refusal of additional instructions is not error. *Dillingham v. Scott*, 554.

TRUSTEE.

Appointment by judge in probate.

It is erroneous for a circuit judge sitting in probate upon an administrator's petition for the distribution of an estate to appoint a trustee. *Estate of Holt*, 78.

TRUSTS.

1. *When terminated.*

A court of equity will not decree that any of the corpus of a trust estate granted for the purpose of paying out of the income thereof certain life annuities, residue to the ultimate beneficiary, be delivered to such ultimate beneficiary, although the income from the corpus of the trust property is far in excess of the sums required to meet remaining annuities, some of the annuities having ceased, and the corpus which will finally go to the ultimate beneficiary is rapidly increasing; the trust must continue until all of the objects intended by the grantor be accomplished. *Queen's Hospital v. Cartwright*, 52.

2. *Instructions by court.*

A court of equity will not ordinarily instruct a trustee not judicially appointed as to the details of the management of the

TRUSTS—Continued.

trust, except to protect him from risk of future liability or in matters of special importance to the interests of the beneficiaries.

Bishop Trust Co. v. Oahu Sugar Co., 183.

3. *Bill to declare.*

Evidence in the case examined and found insufficient to establish a trust. *Lazarus v. Rosewarne*, 441.

VENUE.

In ejectment case.

Under Secs. 1647 and 1649 R. L. the venue in an action of ejectment may be changed. *Kalaeokekoi v. Wailuku Sug. Co.*, 385.

VERDICT.

1. *Conflicting evidence.*

Where the evidence is conflicting the verdict of a jury will not be disturbed. *Kauhane v. Laa*, 526.

WILLS.

1. *Rule in Shelley's case.*

The rule in Shelley's case is not law in this Territory. *Estate of Holt*, 78.

2. *Trusts.*

This court having held that the following clause in a will, "I give, devise and bequeath to my son, * * * one-quarter of all my estate, both real and personal, the income of the same to be paid to him by my executor hereinafter named for his use and support for the term of his natural life, and after the death of my said son I give, devise and bequeath the said one-quarter to the heirs of the said * * * and their assigns," created a trust, that ruling is followed. *Estate of Holt*, 78.

3. *Allowance of fees from estate.*

Under exceptional circumstances the unsuccessful appellants from a decree of this court to the Supreme Court of the United States are allowed counsel fees and expenses from the estate. *Fitchie v. Brown*, 411.

1919

264 5119

